BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES
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ORIGINAL

IN THE MATTER OF:	Docket No. 2009-1
	CRB Webcasting III
DIGITAL PERFORMANCE RIGHT in SOUND RECORDINGS and EPHEMERAL RECORDINGS	REBUTTAL PHASE
	Closing Arguments
	(Pages 497 - 679)

Washington, D.C.

Thursday, September 30, 2010

The following pages constitute the Rebuttal Phase in the above-captioned matter at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Vicky Reiner, RMR, CRR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 9:44 a.m. when were present on behalf of the respective parties:

A P P E A R A N C E S

Copyright Royalty Tribunal:

CHIEF JUDGE JAMES SLEDGE
JUDGE WILLIAM ROBERTS
JUDGE STANLEY C. WISNIEWSKI
Library of Congress
Madison Building
101 Independence Avenue, Southeast
Washington, D.C. 20540

On behalf of SoundExchange, Inc.:

GARRETT A. LEVIN, ESQUIRE
DAVID HANDZO, ESQUIRE
MICHAEL B. DeSANCTIS, ESQUIRE
STEVEN R. ENGLUND, ESQUIRE
Jenner & Block, L.L.P.
1099 New York Avenue, Northwest
Suite 900
Washington, D.C. 20001
(202) 649-6000

On behalf of Live365, Inc.:

DAVID D. OXENFORD, ESQUIRE
Davis Wright Tremaine, L.L.P.
1919 Pennsylvania Avenue, Northwest
Suite 200
Washington, D.C. 20006
(202) 973-5256

- and -

ANGUS MacDONALD, ESQUIRE
ABRAHAM YACOBIAN, ESQUIRE
Hovanesian & Hovanesian, P.C.
301 E. Colorado Boulevard, Suite 514
Pasadena, California 91101
(626) 737-7288

A P P E A R A N C E S

On behalf of Live365, Inc.: (Continued)

DAVID ROSENBERG, ESQUIRE
Live365, Inc.
950 Tower Lane
Suite 1550
Foster City, California 94404
(650) 345-7400

On behalf of Intercollegiate Broadcasting System:

WILLIAM MALONE, ESQUIRE
MATTHEW K. SCHETTENHELM, ESQUIRE
Miller & VanEaton, P.L.L.C.
1120 Connecticut Avenue, Northwest
Suite 1000
Washington, D.C. 20036
(202) 785-0600

ALSO PRESENT:

Colin Rushing

C O N T E N T S

(*No exhibits marked)

P R O C E E D I N G S

CHIEF JUDGE SLEDGE: Good morning, everyone. Welcome back.

MR. MALONE: Yes, sir, thank you. I do have a preliminary matter, Your Honor.

CHIEF JUDGE SLEDGE: The interim between the last time we were together hadn't produced all the settlements that we fully expected you to present to us. But other than that, we've gotten a lot of information from you.

We are here for closing arguments after the record has been closed, to hear any emphasis that you wish to add to matters that you have already presented to us. We have gotten and accepted your time periods for the closing arguments. You're very generous in the time that has been divided. And I wonder why you feel like that you will need that kind of time just to emphasize the matters. Maybe you're expecting a good period of time of dialogue. And that's always a possibility that you can't control. So absent a dialogue, maybe there would not be near the need for the time that you have allocated.

We'll see how you manage that to determine whether we will be able to finish in one seating or whether we will need to have any interruption for midday. But perhaps you will not use enough of the allocated time that we'll be able to conclude the arguments this morning without an interruption.

Mr. Malone.

MR. MALONE: Good morning, Your Honor.

CHIEF JUDGE SLEDGE: Good morning.

MR. MALONE: I would like to introduce to the bench my associate Matthew Schettenhelm.

CHIEF JUDGE SLEDGE: Welcome, Mr. Schettenhelm.

MR. MALONE: A name you've seen various places. Here he is in person.

CHIEF JUDGE SLEDGE: Thank you. All right. Are there any other announcements before we begin the arguments?

Well, thank you. Mr. Handzo.

CLOSING ARGUMENTS ON BEHALF OF SOUNDEXCHANGE, INC.

MR. HANDZO: Thank you, Your Honor. I say having the podium on this side of the courtroom is

going to throw me off. I'll do my best.

CHIEF JUDGE SLEDGE: That's right. We wanted to see how flexible you are. Well, with our renting space from Copyright, we never know what conditions things will be when we find them. This is what we found today.

MR. HANDZO: May it please the Court, David Handzo on behalf of SoundExchange. I'm going to start in I think the obvious place by talking about the evidence supporting the commercial rates. Then I'll address, I think, much more briefly the noncommercial rates, ephemerals. And I'll certainly try and leave time at the end to answer questions from Judge Roberts about terms.

JUDGE ROBERTS: I might surprise you today. I may ask nothing.

MR. HANDZO: That wouldn't disappoint me, Judge Roberts.

JUDGE ROBERTS: I would imagine not.

MR. HANDZO: And I do expect not to use all of my time. But I would ask that, to the extent that I don't, if there is some rebuttal within those time

limits, the Court would permit me to do that.

With respect to the commercial rates, the parties have offered the courts three benchmarks or models that provide a basis to set the rates here. There's the interactive services benchmark testified to by Dr. Pelcovits, the NAB and commercial webcaster settlements negotiated under the Webcaster Settlement Act, and the modeling approach offered by Dr. Fratrik on behalf of Live365.

Now, just at a high level, I would submit that Dr. Fratrik's model is one that can be rejected out of hand. With all due respect to Dr. Fratrik, it's really kind of a ramshackle affair. He uses cost data and subscription revenues from Live on the assumption that it's typical, without any showing that it really is. But he then abandons his assumption that Live is typical and gets his ad revenue data from an industry-wide survey by ZenithOptimedia.

But then he takes the number of industry-wide plays from a different source, AccuStream, and he cobbles that all together.

And Dr. Fratrik tops it off by assuming that

webcasters will exit the market unless they can earn a 20 percent operating margin, a number which he gets from terrestrial radio markets, although he concedes that terrestrial radio has higher barriers to entry, higher capital costs which would ordinarily result in them earning a higher operating return than webcasters do.

Just as problematic, and actually probably more problematic than all of that is the fact that Dr. Fratrik excluded from his calculations something like 40 percent of the revenue that Live earns from what it calls its broadcaster business. So at the end of the day, I would submit that Dr. Fratrik's model can't be relied on and can't be fixed.

SoundExchange has offered two things. First, the WSA agreements with the NAB and with commercial webcasters.

JUDGE WISNIEWSKI: Forgive me, why should we care about that 40 percent that's been excluded?

MR. HANDZO: You should care about it because it is an integral part of Live's business. And because, as Live's own expert, Dr. Salinger,

testified, if you were setting rates for Live, to the extent that Live earns those what they call broadcaster revenues, in part because of their ability to offer webcasting services, Live would naturally consider the value of those broadcaster revenues when they decide what royalty they would be willing to pay.

So Dr. Ordover, Dr. Salinger and Dr. Pelcovits actually all agreed that, what they try and separate out as their broadcaster business, as opposed to their webcaster business, are really all part of the same business. It's one unitary whole. Each one influences the other. So what you will pay for an input to one is going to be determined in part by the revenues that you earn from the whole. And so it does need to be considered.

CHIEF JUDGE SLEDGE: Mr. Handzo, Live made such a concerted effort of intertwining their descriptions of their services and confusing the descriptions of their services. I want to make sure I understand what your -- how you're using what they did to confuse us. When you say broadcasting, Live ended up by saying that their broadcasting services was

their webcasting service. Is that what you're meaning?

MR. HANDZO: Yes. I mean, unfortunately, Judge, I can't give you the definition. It's their definition. I don't think it makes any sense. I think the reason they've never been able to define for you a distinction between broadcasting and webcasting is because there isn't one. That's my point. It's all one thing.

And so I'm necessarily using those terms because they did. But I don't subscribe for a second to the notion that these are actually separate businesses that you can separate. They're not at all. So there isn't a definition that you can come up with that adequately describes one versus the other because they're the same thing.

Now, with respect to the analysis that SoundExchange offered, one thing offered by Dr. Pelcovits was the WSA agreements with the NAB and commercial webcasters originally negotiated with Sirius/XM.

And the rates in those agreements apply to

the precise rights for which this Court is now setting rates for the same rate period. And they were voluntarily negotiated on behalf of webcasters representing a substantial part of this market. And I would submit that that makes those compelling evidence that the Court should consider.

And the third analysis that was offered in this case, again by Dr. Pelcovits, is the interactive benchmark. Benchmarking analysis of course is widely accepted and has been utilized by this court in its decisions in the past. There's really no dispute in this case that if you're going to use a benchmarking approach, the sort of on-demand interactive market is the appropriate benchmark market to look at. No one has disputed that.

So I would submit that Dr. Pelcovits's benchmark analysis, too, is compelling evidence.

Now, I want to dive into a little deeper detail with all of those. But before I do that, I want to take a minute to talk about SoundExchange's rate proposal.

SoundExchange proposes rates that fall in

between the rates in the WSA agreements and the rates derived from the interactive services benchmark, albeit closer to the former. Those start at .0021 dollars per play in 2011 and step up to .0029 dollars per play in 2015.

And that increase over time is similar to what you see in the WSA agreement. So there is economic evidence to support it.

Now, Live has attacked that rate proposal because SoundExchange has not proposed rates that are precisely the interactive benchmark rate or precisely the WSA rates, but rather are somewhere in between. And it seems to be Live's position that if there's a range of reasonable rates, you have to propose rates either at the very top of the range or at the very bottom of the range, but not in between. I think that ignores what Dr. Pelcovits says and it's really just contrary to common sense.

It would be nice if economists always had available to them perfect and complete data and were always able to predict the future behavior of markets with mathematical precision to the 15th decimal point,

but that's just not reality. Economists necessarily have to work with imperfect data and less than totally complete data. And as a result, it's natural to expect that what economists are going to come up with is not one precise number but rather a range within which the market would set rates.

That's what Dr. Pelcovits did. And as he testified, anything that falls within that range is a reasonable market rate in this case. So there is support from Dr. Pelcovits's testimony for the SoundExchange rate proposal. Indeed I believe we asked Dr. Pelcovits about that.

CHIEF JUDGE SLEDGE: There was complaint that no witness presented and supported the SoundExchange proposed rates. What's your response to that?

MR. HANDZO: Well, I would disagree with that a little bit because I believe Dr. Pelcovits was asked about the SoundExchange rate proposal. In fact I believe those rates actually are in Dr. Pelcovits's written testimony. And what he said is yes, I know what the SoundExchange rate proposal is, and yes, that

falls within the range of reasonable rates that I've identified, and therefore I believe that is an appropriate for the Court to set.

So there is that economic analysis. Now, as far as sort of a noneconomist witness testifying about the rate proposal, frankly I'm not sure that would be terribly relevant to the Court.

It seems to me the question really here is is there economic support for it. From Dr. Pelcovits's testimony, there is.

JUDGE WISNIEWSKI: But Dr. Pelcovits didn't address the issue of an increasing number.

MR. HANDZO: That may be right. I frankly don't recall. As I say, I think there is, nevertheless, support for it because in the WSA agreements, there is that step up over time. And this essentially kind of mirrors the way that steps up. So there -- you can look at that evidence and see that willing buyers and willing sellers have agreed to increase the rates over time.

JUDGE WISNIEWSKI: But Dr. Pelcovits did not provide that as part of his analysis on the benchmark

that he used.

MR. HANDZO: No, I think what he did was he sort of agreed that that rate proposal which includes the step up is a reasonable marketplace rate. I don't recall that he specifically addressed the increase -- the amount of the increase from each step. But, again, it does track the WSA agreements.

Now, just going back maybe into a little more detail into each of these methods of analysis and the particular criticisms that have been leveled by Live at some of them. I'll start with the interactive services benchmark.

As I said, benchmarking analysis, I think widely accepted generally and by this court. Although Dr. Salinger in his written testimony called benchmarking a conceptual shortcut, it turns out that actually the one time he testified in a rate setting proceeding, he himself used a benchmarking analysis. So it's clearly supportable.

Again, no one -- there were three economists who testified here, Dr. Fratrik, Dr. Pelcovits -- actually four, Pelcovits, Ordover, Salinger, Fratrik.

Nobody has suggested that you should look at -- if you're going to use a benchmarking analysis, that there's any different market that you should look at besides the on-demand market.

Obviously the key to any benchmarking analysis is to appropriately adjust for the differences between the benchmark market and the target market. Here the significant difference between the two markets is interactivity. And as Dr. Pelcovits explained, he adjusted for this difference between the markets based on his conclusion that the ratio between the revenue per play and the royalty per play would be approximately the same in both.

And Dr. Salinger, Live's rebuttal expert, really had no quarrel with that conclusion. It's basically the same approach that Dr. Pelcovits used in the Webcasting II case, which this Court accepted.

I think Live has one, what I'll call big picture challenge to what Dr. Pelcovits did. Dr. Salinger faults Dr. Pelcovits for using what he says are the wrong revenue numbers in the statutory

webcasting market. He argues that Dr. Pelcovits should have used the sort of lower revenue numbers reflecting revenues obtained from ad-supported services as opposed to revenues from subscription services.

And that argument is wrong for a variety of reasons. First and maybe most importantly, Dr. Salinger assumes a market where webcasting revenues are attributable only to ad revenue or subscription revenue. And that's simply not correct. Webcasters make money from music in lots of ways beyond just selling ads and subscriptions. And Live itself is a very good example of that.

As we started to discuss a little bit earlier, Live sells ads, it sells subscriptions, but over 40 percent of its revenue comes from what it calls its broadcast service. And I can't really define it, but basically they appear to be referring to selling bandwidth and back office services to people who want to webcast.

But as much as Live wants to say those are separate lines of business, they're not. Live's

ability to sell what it calls broadcast services is substantially enhanced by the fact that it's offering those so-called broadcasters the opportunity to be part of Live's webcasting business. In fact I think we saw that in some of the documents where they're actually -- their promotional materials to their so-called broadcasters say, you know, the first reason why you should be a broadcaster with Live, ability to be part of our webcasting network, have your station on as one of our channels. So they're obviously using one to sell the other.

And Dr. Salinger actually acknowledged that. He -- I asked and he agreed that Live earns revenues in addition to ad and subscription. He agreed specifically that if you're setting a royalty for Live, you would have to take that additional revenue from what they call broadcasting into account when you determine what the appropriate royalty is. So that's coming from their own witness.

But then when Dr. Salinger faults Dr. Pelcovits for allegedly assuming more revenue per play than there is, Dr. Salinger pretends that

webcasters only earn revenue from ads and subscription when he knows perfectly well that's not the case, and he knows it because the entity that retained him, Live, earns 40 percent of its revenue in other ways.

It's not just Live that does that. Dr. Ordover testified about the different business models in the webcasting market. And as he testified, there are portals like AOL and Yahoo, which, in addition to selling advertising, are using music to bring people into the portal so that they will go other places and look at ads on other sites, or using music to help keep them there longer. So it's enhancing their overall business in a way that earns money for them that's not reflected directly in advertising revenues that are directly related to the webcasting.

The Rhapsody service, which formerly was owned by Real and I think is now independent, uses statutory webcasting in large part to upsell to its subscription on-demand service.

Terrestrial broadcasters who simulcast are using webcasting essentially to enhance their

terrestrial service and prevent people from leaving that service and going to webcasting, or reaching consumers who are beyond the range of their terrestrial signal.

So there are lots of different ways that webcasters are using music to make money -- I promise I won't use the word "monetize" -- but to make money without --

JUDGE WISNIEWSKI: You just did.

MR. HANDZO: I won't use it again. To make money that doesn't involve advertising and subscription, which is all that Dr. Salinger considered.

And I think the proof of that comes when you look at how Dr. Salinger tried to prove his thesis that the revenues Dr. Pelcovits was using were too low.

The first thing he did was he tried to figure out what the average revenue per play was for Pandora and Live. And then he averaged the two in order to claim that the number is too low and the rates were unaffordable.

In fact, actually, if you look at the number that Dr. Salinger calculated for Live, I think it came out to be .0048 dollars per performance, looking just at the ad revenue and subscription and not at any other revenue. Now, Dr. Salinger said, okay, Dr. Pelcovits's analysis would show that the ratio of the royalty to the revenue is about 47 percent. That is the royalty tends to be about 47 percent of the revenue. Well, if you take that .0048 that he calculated for Live as its revenues just from ad and subscription, and apply that ratio, actually you come out right about where SoundExchange's rate proposal is.

So Dr. Salinger's testimony doesn't prove his point. Actually it kind of proves ours, that the rate proposal is perfectly appropriate.

The other thing, in order to get that number down, what he did was he averaged the Live number with the Pandora number. But the Pandora number that he got, he got the total revenues from a couple of newspaper articles. I mean, which does not seem to be a terribly reliable source of information. And,

indeed, Dr. Salinger didn't really claim that it was. He kind of backed off and said well, this is really just illustrative. It's just not something that can be relied on.

The other way that Dr. Salinger tried to approach it was to look at industry-wide advertising revenues and subscription revenues. And he tried to construct an overall average of what webcasters earned from those two sources.

And the way he did that was he looked at -- for the advertising market, he looked at AccuStream data for industry-wide revenue. And with respect to the AccuStream data, Dr. Salinger doesn't know how AccuStream collects its data. He doesn't know how many webcasters AccuStream gets data from or whether actually AccuStream gets data from any webcasters.

And by the way, actually I think AccuStream is exactly the same report that this court faulted Dr. Brynjolfsson for relying on in the Web II case.

There's another source of industry-wide revenue. That's the ZenithOptimedia report that Dr. Fratrik relied on. And it reports twice the

revenue, ad revenue that AccuStream reports. Dr. Salinger rejected that report without even talking to Dr. Fratrik who relied on it. So I think his data is highly suspect, to say the least.

And then with respect to subscription revenue, Dr. Salinger concluded that .24 percent of plays are subscription supported. But he admitted that number was based on just a portion of the -- a subset of the webcasting business. He didn't look at the whole webcasting business. He excluded, for example, webcasters like Sirius/XM, which is entirely subscription supported.

So in short, his data is flawed. And at the end of the day, the more important point is that it's not Dr. Pelcovits who failed to consider how webcasters earn money. It's Dr. Salinger who failed to consider all the ways they earn money.

Live has a number of other challenges to the Dr. Pelcovits benchmark analysis. But I don't actually think they require extended discussion. And in some cases I'm not capable of giving them extended discussion. And in particular, there's a criticism of

the regression analysis by Dr. Pelcovits which I certainly am not going to hold myself out as a regression expert.

But the principal point here is that that criticism is simply irrelevant. And Dr. Salinger basically said this criticism is irrelevant.

The reason it's irrelevant is that the regression was part of Dr. Pelcovits's method of calculating the interactivity adjustment. And he calculated it two ways. One way was he looked at the ratio between the subscription prices in the interactive market and the subscription prices in the statutory webcasting market and came up with a ratio. And then he did basically the same thing. But, instead of using the actual prices in the webcasting market for subscription services, he came up with a number based on a regression.

And Dr. Salinger said, look, I think he did his regression wrong. But, you know, it really doesn't matter because he had two ways of calculating this. I didn't like the one way but the other way is fine. So at the end of the day, it doesn't really

matter.

Dr. Salinger also faulted Dr. Pelcovits for failing to consider --

JUDGE WISNIEWSKI: Did he say it doesn't matter or it results in a somewhat different number?

MR. HANDZO: I think it would result in a very slightly lower number. But it wouldn't be -- it would still be above SoundExchange's rate proposal.

JUDGE WISNIEWSKI: Thank you.

MR. HANDZO: Dr. Salinger also faulted Dr. Pelcovits for failing to consider indie contracts, which he said would be a problem if, but only if, two things were true. Number 1, indies were a significant part of the market, and number 2, indies were likely to agree to royalties less than what the majors agreed to.

The problem is that Dr. Salinger couldn't say any of those things. He admitted that he didn't know what percentage of the market indies represent. And he also admitted that he really didn't know and didn't have an opinion on whether indies would sell their music for more or less or the same as -- as the

majors.

He did say he thought there were some contracts where indies sold music for less but he hadn't read them. He didn't know how many there were. He didn't know what dates they were. And as I say, I think that his final word on the subject was to admit that he had no opinion.

So he faulted Dr. Pelcovits for not using indie contracts, but then said it only matters if these two things are true, and I don't know whether they're true or not. So there's really not much to do with that.

Dr. Salinger also faulted Dr. Pelcovits for not taking into account the sort of trends in the numbers. And this issue relates to Dr. Pelcovits's use of the effective per play rate in the interactive on-demand market. Basically he was trying to figure out what effective per play rate was paid by on-demand services. And he looked at it for I believe a period of 3 years and averaged that.

And Dr. Salinger said no, no, no, the trend was downward over that time. So you should have taken

the last year, which would have given you a lower effective per play rate. But it's sort of the same thing. It doesn't matter.

Dr. Salinger said that what you -- you know, the fix for that problem would be to multiply the Pelcovits derived rate by .01917 over .02194. And I haven't done the math myself but I am reliably informed and therefore believe that if you do that math, once again, the change to the interactive benchmark is going to be so small that it's still above the rates that SoundExchange proposes. So at the end of the day it's -- whatever you make of that criticism, it doesn't affect the outcome here.

So I would submit to you that the evidence in this case, as the evidence was in Web II, is that interactive on-demand market is a solid basis to set the rate. It's even more so, because in this case, we have corroboration in the form of the WSA agreements.

As you know, there are two agreements covering for-profit webcasters. The first was negotiated between SoundExchange --

JUDGE WISNIEWSKI: Again, I'm confused by

the term you just used of corroboration. Because you had previously referred to them as a separate benchmark.

MR. HANDZO: You know, actually, I have to say, as I said the word "corroboration," I immediately regretted it before you even said that. I think that was probably a poor choice of words. I think that's not really the way we are looking at them. They are in fact two different ways of coming up with the rate that have their independent values. And I think you should look at them as setting a range.

But I do think it's useful to look at them because -- well, for a number of reasons. One is that obviously they are agreements with voluntary buyers. They do cover a substantial percentage of the webcasting industry. And it's the same right being sold that is at issue in this court.

Now, obviously these negotiations took place in circumstances where the rate would be set by this court in the event that the parties failed to reach an agreement. So economists don't really like to refer to them as marketplace benchmarks.

But as Dr. Ordover testified, and I think Dr. Salinger agreed, when buyers are negotiating a rate in a situation where the failure to reach a deal results in a rate-setting procedure, that the buyers anticipate that the Court is going to set a market rate, then they're unlikely to agree to a higher than market rate. And that's the circumstance here.

So there is reason to rely on these rates because the circumstances in which they were negotiated, although it was overshadowed by a potential regulatory proceeding, everybody expected that the outcome of that regulatory proceeding is to set a market rate. And so that's what they would try and achieve in their negotiation.

The WSA agreements, though, I think are particularly useful here because they -- they shed some additional light on this market.

One of the primary arguments by Live that I referred to earlier is that the interactive benchmark market is really looking a lot at the subscription services. Well, these WSA agreements, at least the WSA agreement with the NAB broadcasters, involves

services that are ad supported. They are not subscription services.

So when the Court looks at the range of rates calculated by Dr. Pelcovits, you have the interactive services benchmark at the upper bound, and voluntary agreements with ad-supported broadcasters at the lower bound.

And it simply can't be said that SoundExchange's evidence in this case ignores ad-supported webcasters. It doesn't, because that's exactly what the agreement with the NAB broadcasters is.

So with that, I want to turn to Live's challenges to the WSA agreements. First, Live argues those agreements were negotiated by SoundExchange rather than the individual record companies, and that for that reason they are not useful evidence.

And it is, of course, true that this court has held that the willing sellers in the hypothetical market are the record companies, or the individual record companies. But the statute doesn't require that a voluntary agreement between a willing buyer and

willing seller -- doesn't require that the court can only consider agreements between the actual hypothetical willing buyers and willing sellers. The court can consider, you know, any useful evidence. The question really becomes what effect does it have that SoundExchange was the seller in this case as opposed to the individual record companies.

And we address that in the testimony. The economists who have testified in this case actually all agreed that whether negotiations by SoundExchange, rather than the record companies, would result in a higher or lower rate depends on whether the buyers view the record companies as complements or substitutes. If the buyers view the record companies as complements, then the effect, according to Dr. Ordover and Dr. Salinger, of having SoundExchange negotiate is that it would result in actually a lower rate than what would have been negotiated by the individual record companies on their own.

And as Dr. Ordover explained, the NAB companies, at least, would necessarily view the sound recordings controlled by individual record companies

as complements.

The reason for that is this. The NAB broadcasters create their programming for their terrestrial business in the first instance where they don't need a license. And so they're incorporating music from all of the record companies because they don't need licenses and they don't need to pay for it so they have music from everybody.

Then, having created that programming for their terrestrial broadcasting, they're then trying to put it out over the Internet. Now, they've got essentially baked into their programming music from all the record companies, so they need licenses from all the record companies. In that circumstance, it's kind of unique, but in that circumstance they're going to view the record companies as complements, not substitutes.

And, again, according to Dr. Salinger and Dr. Pelcovits, that means that SoundExchange negotiating on behalf of the record companies is likely to result in a lower rate, not a higher rate.

Live has argued that this court found in

Web II that webcasters don't necessarily need all of the major record companies. But Live is simply ignoring the particular argument that Dr. Ordover made, which is, whatever it might be more generally, if you're looking at the NAB broadcasters in that particular settlement, the NAB broadcasters really do need all of the record companies, and for that reason these are complements and the rate would be lower.

There are other reasons why the negotiations by SoundExchange on behalf of the record companies doesn't really present an issue here. Again, one of them is that the parties were negotiating in a context where they had resort to this court if their negotiations failed to produce an agreement.

And the fact that a rate-setting procedure exists to set a market rate in the absence of an agreement would tend to restrain any exercise of market power that SoundExchange might otherwise have had were it negotiating on behalf of everyone where there wasn't a regulatory setting. And Dr. Salinger, again, agreed with that.

Also in this case, in the case of the NAB

agreement, SoundExchange was negotiating with the NAB, an entity that represented a large number of buyers. As Dr. Ordover testified, that fact gave the buyers substantial market power as well, which would offset any market power that could have been exercised by SoundExchange.

So the fact that these agreements were negotiated by SoundExchange should not affect the outcome here.

Dr. Salinger also argued that you should reject the WSA agreements because the sellers, the NAB or Sirius/XM, may have been engaged in a strategy of raising their rivals' costs.

Now, that I think it has to be said is a theory that is wholly and totally devoid of any evidence. There is simply no evidence in this record to say that's what the buyers in those agreements were trying to do, despite the fact that SoundExchange produced its negotiating documents with respect to those agreements.

And in any event, that strategy of trying to raise your rivals' costs would not work unless

SoundExchange decided to go along with it. Because if SoundExchange obtained a higher than market rate from the NAB companies and Sirius/XM, but then gave a lower rate to other webcasters, that strategy would have backfired on the NAB and Sirius/XM. They would have been paying higher rates and their competitors would wind up paying lower rates. They would have only succeeded in raising their own costs vis-a-vis their competitors, not the other way around.

There's certainly no evidence in this case that SoundExchange decided to help the NAB beat its competition.

For that matter, in a sense, in order for the raising rivals' cost strategy to work, this court in effect would have to go along with it as well. Because if the NAB companies and Sirius/XM agreed to pay an above market rate, and then other webcasters came to this court and the court set a lower rate for those webcasters, the NAB and Sirius/XM would have shot themselves in their collective foot. Again, they would have been stuck paying higher rates when their competitors get lower rates.

So you wouldn't go into the strategy, because you would have no way to assure yourself that this court isn't going to set an appropriate market rate which, according to Dr. Salinger, would be lower than what the NAB and Sirius/XM agreed to pay. So it really just doesn't make a lot of sense.

I think the thing that puts an exclamation point on that argument is that there is a way that NAB and Sirius/XM could have tried to protect themselves against that downside risk of this strategy that Dr. Salinger hypothesizes.

The way to protect yourself would have been to put a most-favored nations clause in the agreements, so that if anybody else got a lower rate than the NAB companies or Sirius/XM, they would get the benefit of that lower rate. That isn't what happened. There isn't a most-favored nations clause, I believe, in the Sirius/XM agreement, and there's a limited one in the NAB agreement. But actually the limited one only applies to lower rates to other broadcasters. It doesn't apply to any rates that this court would set or to lower rates for nonbroadcaster

webcasters.

So it doesn't make any sense to say that they were pursuing a strategy of raising their rivals' costs because they didn't do the obvious thing that one would do to protect your side against that downside risk of putting in a most-favored nations clause.

Dr. Fratrik has a few other arguments about why you should ignore the WSA agreements. He argues that because the NAB negotiated separate limited performance complement waivers with the record companies, the NAB got a benefit for which they are willing to pay higher rates.

Now, I characterize those as limited waivers because they were limited. They weren't across the board performance complement waivers. Basically what they said was we'll give you a performance complement waiver only and to the extent that you are broadcasting traditional broadcasting, terrestrial broadcasting kinds of programming, which tends to be very broad-based, not, you know, six songs from one album all in a row. In fact most of the waivers, even

though they're a waiver, they preclude doing that. So it was not a broad, across the board waiver.

But in any event, the problem with Dr. Fratrik's argument is that both the NAB companies and the record companies anticipated a benefit from the waivers.

For the record companies, the expectation was that the waivers would bring more broadcasters into the webcasting market, which obviously would result in more royalties, which of course would benefit the record companies. So they had a reason to do it and a benefit to them, which would suggest that they're not extracting a higher rate in return for this. Where both parties get a benefit from the performance complement waiver, there is just no reason to think that the price was affected.

And there's essentially a bigger problem with Dr. Fratrik's argument. And that is that if his theory were right, then Sirius/XM and the other commercial webcasters that are part of the -- that WSA agreement should have negotiated materially lower rates because they didn't get a performance compliment

waiver.

In fact, though, the rates agreed to by Sirius/XM and the other commercial webcasters are very close to what the NAB agreed to. So the performance complement waivers that the NAB got do not appear to have had any impact on the price, since the people who didn't get those waivers are paying about the same thing.

Now, Dr. Fratrik also argues that the alleged differences in cost structures between broadcasters and Internet-only webcasters would lead to broadcasters and Sirius/XM agreeing to higher rates than other services could pay.

He's presented no empirical evidence to support that, no empirical evidence that there really are different cost structures between the different webcasters. And he acknowledged that terrestrial broadcasters actually incur some costs that Internet-only webcasters don't incur, such as the cost of an FCC license or paying for on-air talent.

Now, Live points to the fact that simulcasters, broadcasters have no additional

programming costs for their webcasting because they've already essentially incurred those costs to create their terrestrial programming.

But the irony here is, actually, that's also true of Live. Live doesn't pay to create its programming either because the people it calls its broadcasters, who actually pay for the privilege of doing this, create the programming for them. So it's really not a distinction here.

Essentially Live's argument about the difference in cost structures between broadcasters and other commercial webcasters, is really kind of a recycling of the argument that broadcasters made in Web II, except now it's the other way around. In Web II, the broadcasters were saying we have to have lower rates. Now Live is saying the broadcasters actually can pay higher rates.

The bottom line is the Court rejected the flip side of this argument in Web II and it should be rejected again here.

JUDGE WISNIEWSKI: Mr. Handzo, remind me, do the broadcasters get the same rates when they engage

in something other than simulcasting?

MR. HANDZO: I believe the -- I'm not sure of the answer to that. I'll have to check. Actually the answer is yes, they do.

Another argument made by Dr. Fratrik is that the rates agreed to by Sirius/XM and the NAB are higher because they were just avoiding the litigation costs of litigating in this court.

Again, I think that's an argument that really doesn't withstand scrutiny. There's evidence in the record that the projections of what the NAB companies would pay in royalties over the upcoming license term, it's something like $230 million. So even a tiny increase in the rate would quickly dwarf any cost you would save by not litigating.

So it just doesn't make sense when you consider the magnitude of the rates that are -- royalties that are being paid over time.

And in any event, the NAB companies always had the option of not settling but also not litigating. Just because you don't have a settlement with SoundExchange doesn't mean that you need to come

to this court and have to litigate. SoundExchange may have to, but the others don't. So that argument, too, I think can be dismissed.

Lastly, I think Dr. Salinger argues that the rates agreed to under the WSA agreements for the final years of the current rate term are lower. And anyone who doesn't get those rates, because they're not part of that deal, should pay less in the upcoming rate term than the NAB companies and Sirius/XM will pay.

I think that just ignores how markets actually work. If someone comes into the market, a new webcaster comes into the market in 2012, you would expect in an unregulated market that they're going to pay the market rate at that time. They're not going to be able to go to a seller and say, gee, I would like to pay less than everybody else is paying in the market right now because everybody else paid less four years ago when I wasn't in the market. That's not how the market is going to work.

So I think that argument as well can be rejected.

JUDGE WISNIEWSKI: Mr. Handzo, how is that

argument relevant that you just made? They're not a new webcaster.

MR. HANDZO: No, they're not. But I think what we're talking about here is setting rates for webcasters generally. And what we're talking about is how would the market set a rate. What rate would the market set in 2012.

JUDGE WISNIEWSKI: Can you make that same argument, replacing what you used?

MR. HANDZO: Yes, I think so.

JUDGE WISNIEWSKI: With existing webcasters?

MR. HANDZO: If you -- there's no reason why the sellers, again, in an unregulated market, would agree to let Live pay less during the upcoming rate term than everybody else is paying. It would be against the interests of those sellers. Because why would you want to let someone who is paying less in effect take market share from the people who are paying more? You would never do that.

Once you've got, you know, a rate established, essentially, as your market rate, that's what you're going to want to get from all of the

buyers. Because, otherwise, you're cutting your own throat, giving a lower rate to somebody who's taking business away from the people who are paying you more.

JUDGE WISNIEWSKI: Doesn't the argument you're now making presume there has to be exactly the same rate in each year for all of the people who participate in the market?

MR. HANDZO: Well, I think, if what you're asking is would sellers price-discriminate between different webcasters at any given time --

JUDGE WISNIEWSKI: No, I'm not. I'm asking whether there can't be differences between different buyers in the market from year to year. After all, you had differences between the NAB agreement and the XM/Sirius agreement.

MR. HANDZO: There are some small differences. And I don't think anyone would say that, in the marketplace, the rate is going to be, you know, necessarily precisely the same negotiated for every single webcaster. I think, absent the regulatory environment, you might see some slight differences from webcaster to webcaster.

JUDGE WISNIEWSKI: So the conclusion from that is that you could grant them a slightly lower rate than the NAB agreement. And that would be perfectly consistent with still having a rate that everybody is happy with in the market.

MR. HANDZO: Well, I think --

JUDGE WISNIEWSKI: "Happy" being a relative term.

MR. HANDZO: Hypothetically and with emphasis on the word "slight." You know, I can't see anyone agreeing to any difference that would ever be considered material. All I'm saying, I think, is if you have a lot of buyers negotiating with a lot of sellers, you wouldn't expect them all to wind up in precisely the same place. But to the extent that this court --

JUDGE WISNIEWSKI: But you said yourself, or seem to imply yourself that even 1/10,000 of a cent in a market this large was material.

MR. HANDZO: Well, certainly for the NAB webcasters, that turns out to be the case. I think the reality then is -- I think realistically, if what

we're talking about is Live, it's hard for me to see, in an unregulated market, given Live's size, that willing sellers would agree to anything less than what they agreed to with the NAB and Sirius. I can't see any reason why they would ever do that. Because, again, it would be contrary to their interests. If Live is competing with those others, it would be contrary to their interests to give a lower rate to somebody who is going to take market share away from somebody who is paying you a higher rate.

So hypothetically, is it possible that you can have lots of companies negotiating lots of rates and they're not going to come out precisely the same, maybe some slightly higher, some slightly lower, sure, that's possible. But I think if we're talking about Live, there is no reason in the world --

JUDGE WISNIEWSKI: The key is the question of -- the fact that there are competitors.

MR. HANDZO: I think, yes, it does matter that there are competitors. I think everyone would agree that Live is a competitor of the other webcasters in the market. In fact, that's really

Dr. Salinger's principal point when he talks about raising rivals' costs. The whole premise of that is that Live and others are competitors with the rest of them.

JUDGE WISNIEWSKI: And, indeed, when you have competitors, then you don't have the opportunity for price discrimination.

MR. HANDZO: I think that is correct as well. To the extent that they are competing, you're not going to price-discriminate. And so the price that you've agreed to with NAB and Sirius/XM is the price that you're going to insist on from other competitors such as Live.

JUDGE WISNIEWSKI: Why do you insist on a higher price in your proposal for Live365 than the -- what is essentially the default rate for the commercial webcasters in this proceeding?

MR. HANDZO: Well, because we're here to establish what the market rate would be. And as Dr. Pelcovits testified, we've got the, you know, two data points to look at. But we think the actual market is in fact higher. And that's what is in fact

what would be charged.

And so that is the market rate that you would want if you're negotiating with someone like Live in an unregulated market. That's the point of Dr. Pelcovits's analysis.

JUDGE WISNIEWSKI: How could the actual market be higher when the evidence that you've submitted of what is paid in the market consists of the NAB agreement and the XM/Sirius agreement, which are both lower?

MR. HANDZO: Well, I think Dr. Pelcovits actually addressed that. What he said was, again, what you do have to take into account is the fact that this is being negotiated, that NAB and Sirius are being negotiated in a circumstance where there is a regulatory setting.

And in particular what you have to take into account is the fact that the record companies and SoundExchange under this statutory scheme are compelled sellers. They do not have the option not to sell that they would have in an unregulated market. That's an important right that they would extract

value from in an unregulated market.

So the fact that they are selling at a slightly lower than market rate is understandable in this context because they are compelled sellers. They would not be in the hypothetical unregulated market. So you would actually expect a higher rate as a result.

And that's why, I think, when you sort of look at the two methods of analysis that we've presented, it would actually be natural to expect that in an unregulated market, the rate would be higher than what we negotiated with NAB and Sirius/XM.

JUDGE WISNIEWSKI: But then doesn't -- if we were to accept your proposal, doesn't that put us in the position of essentially engaging in producing a hypothetical market that price-discriminates, without having a basis for such price discrimination?

MR. HANDZO: No, I think what you're saying is, you know, our mission is to set the rate that willing buyers would pay willing sellers, period. And that rate is what it is, in effect.

I think your suggestion is kind of assuming

that the NAB and Sirius/XM are the actual -- are where the market would actually come out. And I think my suggestion and Dr. Pelcovits's testimony is it's actually slightly lower than where the market would come out.

So under the mandate this court has to follow --

JUDGE WISNIEWSKI: Well, but for the agreements. And you're not going to deny the agreements exist, and they're going to exist through the next period of time here that we're talking about.

MR. HANDZO: Yeah. No, I certainly don't deny that the agreements exist.

JUDGE WISNIEWSKI: So that's what exists out there in the market at the moment and through 2015, isn't it?

MR. HANDZO: Well, that's what exists out there if you're going to characterize that as the marketplace agreement.

And, again, you know, our argument is it's close to a marketplace agreement because the parties expected that this court would set a marketplace rate.

But it may not be precisely that because of the regulatory overshadowing which would have led SoundExchange to agree to a slightly lower rate. So the actual market rate in an unfettered market would be higher.

Let me just make sure there wasn't another point that I needed to cover on that.

Let me turn to Dr. Fratrik, mindful of the injunction that I really shouldn't use all of my time here.

JUDGE ROBERTS: Mr. Handzo, are you leaving the WSA agreements?

MR. HANDZO: Yes, I am.

JUDGE ROBERTS: Okay. Well, let me ask you one question with respect to that. It's a little bit different than your focus has been up to this point, in that I'm focusing, actually, on the WSA itself, and with respect to the precedential and the nonprecedential agreements. Precedential ones which we've just been talking about.

In your proposed findings, you make a statement that the reason for drawing a distinction

in -- 114(f)(5)(C) I believe is the provision that allows the submission of agreements reached if both parties are in agreement to do so -- that the reason for allowing agreements to remain out of this proceeding is because the Congress recognized that these agreements and the negotiation process was experimental, and that a number of agreements were likely to be experimental with their rates.

And my question to you is, where is your support for that?

MR. HANDZO: Support for the proposition that that's what Congress intended?

JUDGE ROBERTS: Yes.

MR. HANDZO: I confess that I am not conversant enough with the legislative history to point you to legislative history that says that. I think we derived that from the whole purpose of the statute, which was to allow the parties to have the ability to negotiate agreements without the worry that they would necessarily be precedential, which I think implies a desire to let the parties do things that they wouldn't do if they knew these were going to be

precedential, which I think implies the ability to do experimental deals or deals where you just want to see, okay, is this going to work? If it doesn't, I'm not stuck with it.

JUDGE ROBERTS: So that is your conclusion. I note that your proposed findings don't point to any particular passage or piece of legislative history, such as it is, for that conclusion.

MR. HANDZO: I am confident that you have read them correctly unless Mr. Levin tells me otherwise.

But I think the language of the statutes --

JUDGE ROBERTS: Well, in your rebuttal portion, if you come up with something --

MR. HANDZO: That's fine.

JUDGE ROBERTS: -- I'm sure you'll bring it to my attention.

MR. HANDZO: I will bring it to your attention.

I do want to talk about Dr. Fratrik's modeling a little bit more than I did at the outset. As I mentioned, he uses a modeling approach based on

data from a variety of sources.

And I think it's fair to say that a modeling approach is just difficult to do under any circumstances, because it's hard to get the kind of comprehensive and reliable data that you need. And Dr. Fratrik really doesn't even come close.

According to Live's own witness in rebuttal, Dr. Salinger, to model a market, you need cost and revenue data from a representative sample of the industry. Now, mostly Dr. Fratrik is using costs and revenue data from just one company, Live, which even Dr. Salinger says has a unique business model.

So he doesn't have comprehensive data from a representative sample of the industry.

Now, in addition, Dr. Salinger agreed that, if you have webcasters who use webcasting to promote a related line of business, a modeling approach should consider the revenues from that related line of business when you decide what royalties the webcasters would pay. And Dr. Fratrik wholly ignored that data from Live, although he certainly had it.

Moreover, again according to Dr. Salinger,

the market mechanism will not necessarily result in a rate that all webcasters can pay. It's possible, for example, that sellers in an unregulated market might set a rate that can be paid only by buyers with a high ability to pay.

So in order to model a rate that would be set in the market, you have to know something about the cross-elasticities in the market. Because knowing what the cross-elasticities are helps you figure out where the sellers would price within the range of what buyers could afford. Dr. Fratrik didn't even attempt that analysis.

And, again, according to Dr. Salinger, for a marketing approach -- I'm sorry, a modeling approach, you would want to know whether webcasters promote or substitute for other music sales. And Dr. Fratrik tried to claim that webcasting is promotional. But then he wound up acknowledging that it could be substitutional as well and he doesn't know which effect would be greater. So he doesn't account for that variable either.

I think it's fair to say that Live's witness

in its direct phase of this case, Dr. Fratrik, did not successfully consider the necessary inputs to a model that Live's witness in the rebuttal phase, Dr. Salinger, agreed should be considered.

And what data Dr. Fratrik did have was suspect, to put it mildly. Here is how he went about modeling the revenues for the webcasting industry. For subscription revenues, he used Live's data on the theory that Live is typical, although he had no apparent basis for considering Live typical except that it's been around for a while.

For advertising revenues, he abandoned his theory that Live is typical and he instead used total webcasting industry revenues from the ZenithOptimedia study.

Now, leaving aside whether the ZenithOptimedia data is reliable -- and on this record, we have no way to know that it is -- ZenithOptimedia gave Dr. Fratrik only the total industry advertising revenue, but not the total number of plays.

So he couldn't figure out from that

ZenithOptimedia study what the revenue per play was for advertising, which is what he was trying to get to.

So he got the number of plays in the industry from a different source, from AccuStream. And what he does is he divides the total advertising revenues reported by ZenithOptimedia by the total number of plays reported by AccuStream. Even though those two reports have radically different reports on what the size of the advertising revenues in the industry were.

The AccuStream data showed revenues that are half what the ZenithOptimedia numbers were. So he's taking plays from one study that's just radically different from the revenues he's using from another study.

What's actually somewhat more remarkable here is he actually didn't have to go through the gyrations of using the number of performances from one report and the total ad revenues from another report, because actually the AccuStream report has both, it has total ad revenues and has total number of

performances.

So why did Dr. Fratrik decide to use one number from one and another number from the other? The reason is that if he just used the AccuStream advertising revenues and performances, the result he would have derived from his model would have shown that in the hypothetical market, the sellers would pay the buyers to use their sound recordings.

His model would have proven that there should be a negative royalty, which obviously is an absurd result. So he couldn't just use the AccuStream data. He had to mix and match the way he did to get to a result that had even any facial plausibility.

And, finally, with respect to the revenue earned by webcasters like Live, he just ignored the fact that there are revenues besides ads and subscriptions.

So that's the revenue side of Dr. Fratrik's model. Now, on the cost side, he reverted to his theory that Live is typical. And he used Live's costs. And I think Live now asserts that Dr. Fratrik never said that they were typical, only that Live is

representative. I'm not sure I understand what that distinction is. It begs the question, representative of what. Obviously Dr. Fratrik was holding Live out as representative, typical of other webcasters, with no showing that it is.

But, again, leaving that aside, even if you accepted the proposition that Live somehow could be held out as typical of the rest of the industry with respect to its costs, he didn't even address Live's costs correctly. Even though he excluded all of the revenue from what Live calls its broadcaster services business, there were certain line items on the Live P&L where he attributed 100 percent of Live's costs to what it calls its Internet radio business, including information technology and customer support.

So he is splitting up the revenues. But at least for some line items he's giving all the costs to the Internet business.

And the only thing that Live can say in response to that is that Dr. Fratrik thinks there might be some other unidentified line items that reflect costs attributable to the broadcast services,

although none of that appears on the P&Ls that Dr. Fratrik relied on.

Now, on top of all of that, in order to get to the results that he wanted, Dr. Fratrik had to assume that webcasters must earn a 20 percent operating margin. And he based that assumption on the margins earned by terrestrial broadcasters. And as he conceded, and I think Dr. Ordover testified, terrestrial broadcasters have higher capital costs and higher barriers to entry. And that's the reason why they tend to earn higher operating margins. It's not true of webcasting and you can't simply import one number into the other.

Then, most fundamentally, and this is a theme I've repeated several times now, but most fundamentally, Dr. Fratrik simply failed to consider Live's business as a whole. He treated Live as though it has two separate and distinct lines of business, which it doesn't.

And he did that even though the people who Live calls its broadcasters pay fees to Live, which Live then uses to pay the royalties for the use of

music. I mean, you just can't separate these two business. But that's what Dr. Fratrik did. Dr. Ordover told you that was wrong. Dr. Salinger agreed. And there's just no way to use this model.

It should come as no surprise, I think, as a result, that Dr. Fratrik's results just don't make any sense.

If his model is correct, then Live should close its doors right now. Because even if you adopted the rate that Dr. Fratrik derives from his model, Live would not earn a 20 percent operating margin. That's what his model shows. And his whole thesis is that webcasters need to earn a 20 percent operating margin if they're going to stay in business. That's what a willing buyer would demand. So even under his own model, Live should be hanging up the gone fishing sign if you adopt his rate. The result just makes no sense. That model is simply irredeemable.

Here is the reality test for all of this. Live can pay the rates that SoundExchange is proposing. Live is profitable now. Quite profitable

at the current rates. And if you look at Live's business as a whole, using its 2009 data, Live would remain EBITDA positive for every year of the rate term except for the last, 2015. And that assumes there's no increase at all in Live's revenues per play, which is not really a realistic assumption. If nothing else, Live has shown it has the ability to pass on royalty increases, at least to some degree, to the people it calls its broadcasters. We have that from Mr. Lam's deposition.

So I would submit that the Court should adopt SoundExchange's rate proposal with respect to commercial rates.

I should take just a minute to comment on Live's arguments about promotion and substitution, contribution, cost and risk. The statute does direct the Court to consider those things, although the Court has, we would submit correctly, in the past concluded that if you're looking at a marketplace benchmark, those are already considered as part of the marketplace benchmark so you don't actually need to consider them separately.

But with respect to promotion and substitution, SoundExchange did present testimony from record company executives about the substitutional effect of digital music services, including webcasting.

And Dr. Pelcovits in his analysis performed the same substitution analysis that he performed in Web II, where he assumed that there was a difference in terms of their effect on promotion and substitution between the on-demand market and the statutory webcasting market.

SoundExchange also presented testimony from the record companies about their substantial contributions, costs and risks.

Now, Live claims to have presented empirical evidence that proves that statutory webcasting is promotional. But that evidence just does nothing of the sort.

Dr. Fratrik pointed to some royalty-free agreements with independent labels as evidence of promotional effect of webcasting. But all of those agreements are at least five years old. And some of

them require Live to undertake active promotion of the label's music.

So those agreements don't prove that webcasting is promotional. They simply prove that some record labels will waive the royalty if they get other consideration in the form of Live's promotional efforts.

And, interestingly, Live's own witness, Dianne Lockhart, testified that when she tried to convince a record company to waive the royalty for her station, she was summarily rejected.

Live also relies on Mr. Smallens's inclusion of a quote from somebody named Russ Crupnick, about the allegedly promotional benefits of statutory webcasting. But the study that Mr. Crupnick is referring to is not in evidence. His methodology is entirely unknown and has no probative value here whatsoever.

With respect to the relative contributions, costs and risks, Live has focused only on factors with respect to webcasting services and totally ignored the contributions of the record companies. And I don't

think there can be any real dispute that the record companies make extremely significant contributions, incur huge costs, and have assumed risks with respect to the creation of the copyrighted works that are at issue here.

So ultimately, although Live claims to have presented evidence justifying a downward adjustment to account for promotion and risk and contribution, they haven't given any evidence that those factors exist and certainly haven't given any way to quantify it.

Now, I do want to touch on the -- there are a few remaining issues in the case which I can move through quickly. I think the minimum fee, which we proposed $500 per station or channel with a $50,000 cap for commercial webcasters. Live agrees with that. And the parties have submitted a stipulation to the Court with respect to that.

It is the minimum that was adopted by this Court for the rate period, the current rate period in the Web II case. And there is significant evidence to support it.

The NAB and the Sirius/XM WSA agreements

have that same minimum and cap. And SoundExchange has presented evidence regarding its administrative costs being higher than that amount. And that, too supports the minimum that we proposed.

JUDGE ROBERTS: Mr. Handzo, in your view, what if any precedential effect does our adoption in Webcaster II of the $500 fee have in this proceeding?

MR. HANDZO: I don't think the Court is bound in some stare decisis way by its decision in Web II. But I think the reality is that the evidential record in both cases is very similar. And it stands to reason that, where the evidence in two cases is very similar, the result ought to wind up being the same. But I'm not suggesting that you are bound by that.

JUDGE ROBERTS: Okay.

MR. HANDZO: With respect to the noncommercial rates, SoundExchange has proposed $500 per channel or station per year unless the noncommercial webcaster exceeds 159,140 ATH per month, in which case, for the amount over that level, they would pay the rates proposed by SoundExchange for

commercial webcasters.

IBS actually agrees with the payment of the commercial rates that we proposed over 159,140 ATH per month. It actually agrees that noncoms who have more than 15,914 ATH per month should pay an annual fee of 500.

So actually the dispute in this case between SoundExchange and IBS is really over the fee that noncoms would pay if they have an ATH lower than 15,914 ATH per month.

Now, I think the evidence here is that over 300 webcasters already pay, noncommercial webcasters already pay that annual $500 fee for 2009.

The agreement that SoundExchange reached with CBI has the same rates that SoundExchange is proposing here. The $500 annual fee that we're proposing is less than SoundExchange's administrative costs per channel. I think that's in Ms. Kessler's testimony.

And although IBS has tried to argue that some of the noncoms can't afford that $500 annual fee, I don't think the evidence supports that. Actually,

the only commercial station that IBS put on was WHUS, UConn, which had a profit of $87,000 in 2009.

And even if the annual budget of small noncoms is $9,000, which I think is what IBS argues, $9,000 is still a heck of a lot more than a $500 fee. It's still a pretty small percentage of that budget.

It's interesting to note that anybody who is an IBS noncommercial broadcaster who chooses to go to the IBS conventions is going to pay $480 for the privilege of attending. You're going to pay 125 just to belong to IBS. So viewed in that context, a $500 fee for being a webcaster is certainly not excessive. And there's really no basis for IBS's proposal.

I'm not going to walk through exactly what IBS's proposal is except to say that they're proposing a very low annual fee of I believe $20 for really small webcasters, and $50 for slightly larger noncommercial webcasters. I believe that, to the extent that IBS has submitted any evidence at all -- and I don't think the evidence they submitted actually supports either those different levels or the amount -- it's basically the same evidentiary record

that this court considered recently in I believe the Web II remand, where the Court rejected that evidence and agreed with SoundExchange's proposal of a $500 fee for noncommercial webcasters below that ATH cap.

And, again, since the evidentiary record is basically the same here as it was there, I would submit that the outcome ought to be the same.

I probably do need to touch briefly on ephemerals. SoundExchange has proposed that the 112 and the 114 rights be bundled together, with 5 percent attributed to the 112 right and 95 percent to the 114. That is likewise the subject of a stipulation between Live and SoundExchange. And IBS I believe also agrees with it. And there is an evidentiary record to support it.

There is testimony from Dr. Ford that the ephemerals do have value, that he reviewed agreements in unregulated markets, and those rights generally are sold together as a bundle.

And so the only issue really is how do you allocate in that bundle between the ephemerals and the 114 rights. And there, the only parties with a real

interest in that are the record companies and the artists who agreed in the SoundExchange rate proposal that that should be 5 percent.

So I think there is an evidentiary record to support what the parties have stipulated to.

Lastly, we have proposed some terms. I think they're all fairly straightforward in the sense of permitting SoundExchange to more efficiently administer and distribute the royalties that it receives. At least one of the terms has been stipulated to. The rest have really not been contested. I think the only real argument here has been that they should be the subject of a separate rule-making procedure rather than determined here. But, I think it is perfectly appropriate for the Court to determine them here in the litigated proceeding. It may be that not everyone has participated. But that can be the same in a rule-making as well. That's always the case.

So there really hasn't been any contest with respect to SoundExchange's proposed terms. Nor has anyone really contested SoundExchange's request that

it be designated as a sole collective.

So if I may, I would like to take 30 seconds to check with my colleagues to see if I've omitted anything that I really should say.

Just one point that I had been reminded of. The -- in answer to a question from the Court about whether the rates in the NAB agreement applied to nonsimulcasting. They do. But I should point out that the performance complement waiver does not apply to that.

With that, I have nothing further unless the Court has questions for me.

JUDGE ROBERTS: You have 30 minutes left for your rebuttal.

MR. HANDZO: Thank you.

CHIEF JUDGE SLEDGE: Mr. Oxenford.

CLOSING ARGUMENTS ON BEHALF OF LIVE365, INC.

MR. OXENFORD: Good morning, Your Honor. For the record I'm David Oxenford on behalf of Live365. I always hesitate to follow Mr. Handzo because he always sounds so reasonable. But he reminds me of a book review that I read in the New

York Times book review section just 2 weeks ago. It was about a book called "Proofiness: The Dark Arts of Mathematical Deception." And it's a book that I really need to go out and read, I think, if I'm going to be doing cases like this.

Because the case talks about the use of statistics and numbers to try to influence policy makers, and how sometimes those numbers are misused. Sometimes those numbers are just the results of urban myths and don't have any basis in reality.

Other times, they're the result, according to the review, of a process called disestimation, ascribing too much meaning to a measurement relative to the uncertainties and errors inherent in some of those measurements.

I think it's appropriate when we consider the evidence that was provided here, the criticisms that were made, and the facts that have been thrown out here, to assess just where some of this evidence comes from. Where these numbers come from. Which way the perceived errors in fact cut that the parties are accusing each other of using in connection with their

numbers.

We have heard a lot about the criticism of Dr. Fratrik's testimony. And then a lot to rebut the criticism that we have offered with respect to Dr. Pelcovits's testimony.

And I think when you actually sit down and analyze a lot of that criticism, you'll see that almost all of the errors that are urged in Dr. Fratrik's testimony actually benefit SoundExchange. While all of those errors that we may say exist in Dr. Pelcovits's testimony, they don't benefit Live365 if you credit those criticisms. Again, they would benefit SoundExchange.

You know, Dr. -- Mr. -- Judge Roberts, you mentioned the whole question of the experimental authorizations. Judge Wisniewski, you were talking about the questions about price discrimination and whether there would in fact be differences in the marketplace. You know, I was struck by SoundExchange's proposed findings, how in the very opening they recognized that there could be different market -- there can be different rates for different

players in the market.

They recognize that there are eight separate WSA agreements. Certainly we don't have in evidence what those agreements are. But there are at least eight separate agreements out there setting different rates.

And, yet, when we propose a rate that's different than what's in the WSA agreements, we're criticized, saying oh, they would never set such agreements. We're criticized for saying that, oh -- or we're criticized because we can't show evidence that other agreements are out there in the record. Or we don't have record evidence to show that there are other agreements out there in the marketplace.

Yet, again, there are eight agreements, as they say in their own proposed findings. But we're not allowed to say what is contained in those agreements.

We're also told that --

JUDGE ROBERTS: When you're mentioning that, Mr. Oxenford, wouldn't it be your point of view, however, that no matter how many other WSA agreements

there are that are not in evidence in this proceeding, I would presume that they all have been negotiated by SoundExchange. And, therefore, they're not of any value in your view to these proceedings. So what do we need to really know about them in that case?

MR. OXENFORD: Judge Roberts, we just need to know that they're out there because we are faced with a number of proposed conclusions that say we've presented no evidence that there are not other agreements out there. Dr. Ordover says, oh, they would never reach agreements at a rate lower than the WSA agreements.

JUDGE ROBERTS: But once again, if SoundExchange is the one negotiating them, and we're looking at the hypothetical marketplace, as I read your proposed findings, those agreements, just like the two that have been submitted here, are irrelevant, because it's not the correct seller. And at least with respect to the NAB, it's not the correct buyer.

MR. OXENFORD: That's correct. We agree -- we believe that the WSA agreements do not present an appropriate benchmark because --

JUDGE ROBERTS: Right.

MR. OXENFORD: -- SoundExchange is not a willing seller in the context that you've used.

JUDGE ROBERTS: Right. But that's why I'm confused as to why you're worrying about the agreements that we didn't see, again, and it is an assumption, that SoundExchange is the one that negotiated all of them --

MR. OXENFORD: Correct.

JUDGE ROBERTS: -- though I think it's a reasonable assumption. And I don't see why those should bother you either.

MR. OXENFORD: Well, they bother me to the extent that SoundExchange has criticized theories, they've criticized statements that witnesses have made, saying that nothing else is out there. They've effectively said that nothing else exists other than what's in the record, and faulted some of our witnesses for providing some of that information.

I would suggest that, look at --

CHIEF JUDGE SLEDGE: Mr. Oxenford, let me save you some time.

MR. OXENFORD: Sure.

CHIEF JUDGE SLEDGE: You're in the wrong venue to argue that Congress passed a bad law. We're going to follow the law that Congress passed. So go ahead and deal with the law that was passed.

MR. OXENFORD: I understand that, Your Honor. I'm just trying to put in context some of the statements that were made in the reply findings.

CHIEF JUDGE SLEDGE: Congress said that they can do it that way. So go ahead and deal with what the law says.

MR. OXENFORD: Yes, Your Honor. In fact let's turn, Judge Roberts, to the question about SoundExchange being a willing seller when Dr. -- when Dr. Handzo -- I'm already attributing -- his mathematical abilities have clearly overwhelmed me.

JUDGE ROBERTS: They're not that wonderful, Mr. Oxenford, I assure you.

JUDGE WISNIEWSKI: There are all kinds of doctors. So....

MR. OXENFORD: There are, indeed.

When we talk about SoundExchange as being a

willing seller, in fact, Mr. Handzo suggests that SoundExchange would actually agree to rates lower than those rates that would be established by webcasters in the marketplace because the record -- the rights to the different record labels are complements, not substitutes.

You know, if that was the case, if SoundExchange is always going to set a lower rate than the willing buyer/willing seller rate, we can really cut this argument short because we should just be accepting SoundExchange's rates.

But in fact, we've got to look at the reality of what went on. We've got to look at the reality of the negotiation process. We've got to look at the reality of who those parties were that engaged in the negotiation process.

You know, we had suggested that there is an element of rivals raising costs here. Mr. Handzo suggests, oh, no, there can't be rivals raising costs because, first of all, SoundExchange would have had to agree to that. Secondly, hey, it's not reflected in any of the settlement documents that were produced in

discovery.

Well, you know, I can't see in any of the settlement documents the parties, the NAB writing to SoundExchange saying, hey, we want to raise our rivals' costs, or let's set these royalties higher than they otherwise would be. It's not surprising that it's not produced in the documents.

Secondly, the -- I lost my train of thought. The other point is that these agreements, the testimony from Mr. McCrady was that these were agreements that were entered into in expectation of the rates that the Court would set. And then they were made precedential by agreement of the parties to, in effect, be used as evidence for what -- the rates that the Court would set. In effect, they're circular agreements. They were set with their belief as to what you would set as rates. And then offered as evidence for what those rates should be, effectively a circular process, a self-fulfilling prophecy, one that effectively provides that kind of guarantee, if you will, to the parties entering into them that there's not going to be lower rates for the rivals of

SoundExchange who are -- I'm sorry, of the broadcasters who are appearing before you here today.

Now, Mr. Handzo also says that our criticism of the WSA agreements, that these agreements do not reflect the -- or that the economics of broadcasters and pure webcasters, they don't reflect any real differences. That we've ignored the costs that the broadcasters, for instance, have for FCC licenses and that sort of thing.

Dr. Ordover, their own witness, suggested that broadcasters and XM/Sirius are engaging -- would engage in webcasting, would pay royalties for webcasting that didn't allow for effectively any profit margin if it's going to benefit their terrestrial or their core business, the satellite business, the broadcast business.

Mr. Handzo throws out the question, oh, they have other costs like FCC licenses. Sure. And they've got lots of other revenues to pay for those costs from their core businesses.

The webcasting businesses for which we're setting royalties here today is not the adjunct, the

minor adjunct to some other core business. In fact, I think that reflects part of his concerns about, oh, well, there are all these other revenue sources for webcasters. He's trying to look at other businesses and trying to come up with some theory that those other businesses' revenues should be considered here, when, in -- especially in this webcasting services agreement, especially in connection with Sirius/XM, the clear testimony is that these parties would agree to higher royalty rates, to continue streaming, because they can't leave the industry because they recognize that they are a -- the competitive nature of the industry, that people are -- that it's a potential competitor in the future. They can't just abandon this industry. But, yet, they would be willing to take lower returns because it's not their core business.

In addition, we've presented all sorts of evidence about how broadcasters can more easily pay these royalties and XM/Sirius. They already have sales teams. They already have built-in relationships with advertisers, especially for the broadcasters,

they have connections with local advertisers who provide the bulk of the advertising revenue for broadcasters and for their local streams, so they don't have to go out and use the kinds of sales representatives that webcasters have to use and pay exorbitant royalty rates -- exorbitant commission rates.

In fact, that leads me to another point in that we heard nothing from Mr. Handzo today about the state of the webcasting industry generally.

When I started the opening statement that I made in April, on the first day of trial, I quoted Mr. Handzo from his opening statement from the Web II case that said -- quoted Mr. Brynjolfsson, or Dr. Brynjolfsson, stating that, if business had gotten better, then the rate should go up. If business has gotten worse, the rate should go down.

And we heard nothing from Mr. Handzo here this morning about the actual business of webcasting. And in fact, when you look at the state of the industry, I think you'll see that any analysis of the state of the industry does not support a conclusion

that the business has gotten better in the webcasting industry since your decision in the Web II case.

You'll see evidence that there has been a decline in CPMs, the advertising rates that webcasters are able to command in the marketplace. That advertising sellout rates, the percentage of their advertising that webcasters are able to sell in the marketplace has decreased.

You'll see ample evidence that there's abundant excess ad inventory, further driving down CPM rates, making webcasters rely on third parties, ad networks that go out and charge webcasters as much as 40 percent commissions on the advertising that they sell.

You'll see that listener growth has begun to flatten. That, really, all of the growth in the marketplace has been attributable to essentially one webcaster in the last several years.

And most importantly, you'll see that the growth in a metric that's not even addressed in the proposed findings or the reply findings of SoundExchange, revenue per performance, which is the

key metric in assessing what webcasters would agree to in a willing buyer/willing marketplace when you're setting a royalty that's based on a royalty per performance. It's not even addressed by SoundExchange. Yet, we have demonstrated that webcasters are not able to pay at the rates that are suggested by SoundExchange.

Even in light of the clear evidence that the industry has not been in a state of growth in terms of its revenue per performance. That CPMs, the most direct evidence that we have of that metric, are going down. We still see rates that are proposing to go up.

CHIEF JUDGE SLEDGE: Mr. Oxenford.

MR. OXENFORD: Yes.

CHIEF JUDGE SLEDGE: Your comment on the general industry and specifically on listenership, the findings that you presented show substantial increases in listenership for all years except for '08 and '09. And '08 to '09 is flat.

MR. OXENFORD: Correct.

CHIEF JUDGE SLEDGE: So when you say that the listenership is flat, you're ignoring all the

years before '09 and making that statement based only on the figures for '09; is that correct?

MR. OXENFORD: Your Honor, what I intended to say, and perhaps I didn't say it, was flattening as opposed to flat. Because I know that you raised that question.

But what the evidence clearly does show is that any growth that exists in that marketplace is due to the growth of a single webcaster, Pandora. And Dr. Pelcovits, when Judge Wisniewski asked him to compare the curves, admitted that the growth in the last several years has been due to one webcaster, Pandora.

JUDGE WISNIEWSKI: But, Mr. Oxenford, the data that you presented that Judge Sledge is referring to, that was the chart that I think had 5 or 6 years worth of information.

MR. OXENFORD: Correct.

JUDGE WISNIEWSKI: Essentially looked like a step-wise function where you had several periods that you could define as flattening the way that you define the last 2 years.

MR. OXENFORD: Correct.

JUDGE WISNIEWSKI: So how does that show anything?

MR. OXENFORD: Well, but again, even -- even if I'm wrong, even if I'm totally wrong and listening is increasing, we have not shown that the ability to monetize on a per listener basis -- and I used the word "monetize," I apologize -- the ability to bring in revenue at a per performance basis has been increasing.

Again, look at CPMs, the figures are all showing that they're dropping. Even Dr. Pelcovits agreed that the CPM rates are either flat or declining.

JUDGE WISNIEWSKI: Over what period do we have to show that? Are you asking us now to also get into the whole notion of forecasting over the next 5 years?

MR. OXENFORD: I'm not. In fact the revenue models that we're looking at are the revenues for the current period. Even Dr. Pelcovits's revenue models that he's looking at --

JUDGE WISNIEWSKI: But we're setting rates for 5 years, aren't we?

MR. OXENFORD: We are. We are. And in fact --

JUDGE WISNIEWSKI: Why should we base that on just the -- what may have happened in the past year?

You would agree that the past year has not been the best year for the economy as a whole, wouldn't you?

MR. OXENFORD: No question. Except that these trends that we have shown in terms of declining CPM rates and declining sellout rates were not ones that simply took into account the last year. It's been declining CPM rates for several years. It's been increasing reliance on advertising network because of excess inventory that are taking ever larger commissions, again over several years.

JUDGE WISNIEWSKI: And what evidence can you point to that shows that that is, number 1, a trend, but secondly, that the trend would continue throughout the period of the license?

MR. OXENFORD: Even Dr. Pelcovits, in taking his analysis of what the marketplace is, looks at a benchmark of what the reality is today. Now, Dr. Fratrik -- and we were criticized in Dr. Fratrik's model for using the ZenithOptimedia revenue model, which was more optimistic, double what AccuStream suggested.

Dr. Fratrik said that the reason that he used that most optimistic revenue model was because it would allow for industry growth. So we have taken that into account in the models that we've presented to the Court.

JUDGE WISNIEWSKI: I fail to see that. I'm sorry. I fail to see that. You're going to have to give me something more persuasive because I fail to see that in the evidence you presented.

MR. OXENFORD: Dr. Fratrik said that in his --

JUDGE WISNIEWSKI: Where did Dr. Fratrik show rates of growth through 2015?

MR. OXENFORD: Well, we're not -- I'm not asking that we project the rates of growth through

2015.

JUDGE WISNIEWSKI: That was the question that I had asked you.

MR. OXENFORD: Okay.

JUDGE WISNIEWSKI: But, yet, you seem to be indicating that that is what we should be doing.

MR. OXENFORD: What I'm suggesting is that the current rates, if we're looking -- the current performance of the industry is not one that's been increasing. It's not one that's on an upward trajectory. And while I don't ask that you set rates based on predictions as to what the future will bring, I do ask that you look at the state of the industry to determine whether it's reasonable to set rates that continue higher, which can only be set on the assumption that the business will be increasing, and we have no evidence that the business will be increasing, that the ability to pay royalties at an even higher rate will be there in the marketplace.

JUDGE WISNIEWSKI: Okay. And in terms of the standard that governs this proceeding, the way that you relate that back is to say that there would

be no willing buyer --

MR. OXENFORD: Exactly.

JUDGE WISNIEWSKI: -- under those circumstances.

MR. OXENFORD: Exactly. There would be no willing buyer. In fact, again, we show, both Dr. Salinger and Mr. Smallens did computations to show that the most successful webcaster in the marketplace would not -- would be paying essentially 100 percent of its revenues to SoundExchange even at the current royalty rate, much less the royalty rates that are proposed by SoundExchange going forward.

Now, Mr. Handzo criticizes the revenue figure that we used for Pandora that was widely reported in the press. Yet, Mr. Smallens on his direct examination was asked, did you have other sources to confirm that. He said, yes, from evidence produced in this proceeding, from the discovery produced in this proceeding by SoundExchange.

So it's not just a number made up out of the air. That the most successful webcaster, that even Dr. Pelcovits holds up as the most successful

webcaster, would be paying 100 percent of its revenues as royalties under the current royalty rate, much less the increased royalty rates that Dr. Pelcovits suggests.

CHIEF JUDGE SLEDGE: Is there any difference between the characterization you've made about excess advertising inventory causing higher commissions because of reliance on networks, and the lower CPMs from the state and terrestrial market where the advertising rates for peak times greatly exceed the advertising rates for late night and nonpeak times?

It would appear that, as listenership goes up, then you're going to have a lot of transmission occurring in nonpeak time. And as listenership of nonpeak time goes up, then your nonpeak rates are going to be applying to a greater percentage of the advertising revenue.

So why -- what is different there in this argument than what has always been true in the terrestrial market?

MR. OXENFORD: Well, Judge Sledge, that's exactly our argument, is that there is a lot of

nonpeak, as you say, listening here. But we're paying the same rates for all of that listening that we're paying for the peak listening.

CHIEF JUDGE SLEDGE: Because you choose to stream during nonpeak times.

MR. OXENFORD: But it's not -- in the webcasting world, the peak is not hours. The peak may be demographics. The peak may be location. We've heard lots of testimony from SoundExchange about, oh, well, sooner or later, webcasters will be able to make more money because they can reach particularly targeted markets. They can reach particular demographics.

But the only way that you can provide enough mass to reach those targeted markets is by streaming a lot. And the problem is, yes, you may be able to get some premium rates by reaching males in Cincinnati; but for a webcasting service to reach enough males in Cincinnati to interest an advertiser, you've got to stream a whole lot of time to females in Oshkosh and children in Texas.

You know, it just -- there is a lot of

streaming that goes on that just can't be monetized. Yet, we have to pay the royalties.

That was the import of Mr. Smallens' testimony. That there was lots and lots of streaming that goes on in order to be able to provide the demographics, provide the numbers that advertisers are looking for.

But, yet, what we're being asked by the SoundExchange proposal is to value all of that time as if it is premium time, as if it is being created at the highest possible level at which revenue comes in, the revenue from a subscription model.

CHIEF JUDGE SLEDGE: So you're benefiting from having higher listenerships because you can go to buyers of advertising and show higher numbers.

And to get those -- and to have those higher listenerships, you're using music -- to get that higher listenership, you're using copyright content.

MR. OXENFORD: Correct.

CHIEF JUDGE SLEDGE: Yet, you're arguing that you don't want to pay for using that at the rate -- at a rate that has been established to this

point. And, yet, but you want the benefit from it.

MR. OXENFORD: What we're arguing is that a webcaster would only pay a rate at which it can pay its cost and make a return. No willing buyer is going to engage in a business in which they can't pay their costs and make some sort of return.

And it's -- all the testimony is that webcasters have to stream to folks that they can't make a lot of money from. That -- but we're still paying on a per performance basis the same rate for every one of those songs that stream to every one of those listeners, even though we're not able to monetize each one.

The analogy that Dr. Salinger used, it's like an airline. Yes, the airline would love to fly nothing but first class seats with customers paying first class rates. But you can't do that. You also have to fill up the airplane with folks paying coach rates.

Essentially, it's -- it's the same thing here. Yes, we would love to be selling only subscription services or only some high CPM that we

can get for a specific niche market. But to be able to provide those CPMs, to be able to provide that aggregated audience, you have to provide a lot of other audience. And when you do the blended rate for all those performances, it's not at a rate that can be paid at the royalties that SoundExchange suggests.

And that's in essence our criticism of Dr. Pelcovits's proposal. That his proposal doesn't model the industry as it is. It models the industry as if it was all premium services, subscription services. Dr. Salinger presented a different model, or took Dr. Pelcovits's model and included advertising revenue.

What was Dr. Pelcovits's reasoning for not doing it? He said it was hard to figure out what the proper rates to be used in the attributing revenue to advertising-supported streams. But, yet, you know, Dr. Salinger was able to do it and come up with a lower royalty rate.

Now, certainly, Mr. Handzo criticizes his assumptions, whether he used AccuStream or ZenithOptimedia. But even if he used the

ZenithOptimedia numbers, it still comes in well below what SoundExchange is proposing as their royalties.

So, you know, we can't credit a regression analysis that only takes into account a marketplace that essentially doesn't exist, a pure subscription marketplace.

The only evidence that we have of any webcaster who is out there that is just a pure subscription statutory webcaster is XM/Sirius. And, again, that's only in a situation where this is an adjunct of another business that they're already in, where, as Dr. Ordover said, they would be willing to take few, if any, profits just to support the business from which they make all their money, their satellite service.

CHIEF JUDGE SLEDGE: And the webcasters make business decisions to increase the royalties they pay in order to get higher listenership. They have the option to decrease the royalties they pay and thereby decrease their listenership and tailor their listenership to peak times versus nonpeak times.

MR. OXENFORD: Your Honor, I don't think

there is any evidence in the record that says that is a real option for webcasters, that a webcaster can operate a successful business only by streaming to those 18 to 35-year-old males in Cincinnati, or only streaming to subscription customers. There's nothing in the record that indicates that any webcaster could operate that way without having the Sirius/XM operation.

JUDGE ROBERTS: Is that --

CHIEF JUDGE SLEDGE: Well, and that's -- and that fits with what you're saying, what you're complaining about. You're saying that we don't -- we shouldn't have to pay peak rates for streaming when we've decided industry-wide to peak -- to stream all the time and in nonpeak times.

MR. OXENFORD: But --

CHIEF JUDGE SLEDGE: You're arguing against your very argument.

MR. OXENFORD: I don't -- respectfully, Your Honor, I don't believe I am. I'm trying to make the point that you simply cannot stream solely to those peak audiences. Whether they be a particular

demographic, a particular time, or a subscription only audience. There's nothing in the record that indicates a successful webcaster, webcaster standing alone, can do that. There's nothing in the record.

CHIEF JUDGE SLEDGE: Judge Roberts, I interrupted you.

JUDGE ROBERTS: That's all right. Is that because you're a national service as opposed to a regional service? Isn't that why you don't -- you know, when we talk about a broadcaster and maybe a broadcaster streaming, most of the listenership is probably within the region. But in the instance of Live365, you're a national service.

MR. OXENFORD: Right, but --

JUDGE ROBERTS: So you don't really have a peak time, do you?

MR. OXENFORD: Exactly.

JUDGE ROBERTS: Okay.

MR. OXENFORD: And I think, again, peak -- the time question for webcasting isn't as relevant. I mean, the peak time --

JUDGE ROBERTS: As it is for broadcasting.

MR. OXENFORD: -- versus the demographics and the method of streaming, it's a different kind of peak. It's not hours. It's the type of audience where you get the higher CPMs, not necessarily the hours.

JUDGE ROBERTS: Okay.

MR. OXENFORD: And, in fact, to further address this point, even SoundExchange's witnesses have testified that setting the rates at the highest possible level is not the appropriate level to set them at. What you're looking for is a profit maximizing rate. And it may be lower than that highest level because you'll get more total revenue from more streaming done at a lower level than at that absolute highest royalty rate that somebody could possibly pay for those peak times. If you've got more listening paying a lower royalty, you'll actually bring in more total revenue for the collective.

JUDGE WISNIEWSKI: Well, that depends on the elasticity of demand, doesn't it?

MR. OXENFORD: It does. It does. But --

JUDGE WISNIEWSKI: And you haven't any

evidence to show that --

MR. OXENFORD: Nor does SoundExchange.

JUDGE WISNIEWSKI: -- in the record.

MR. OXENFORD: Nor does SoundExchange.

JUDGE WISNIEWSKI: Why make the argument if you have no evidence?

MR. OXENFORD: Well, it's SoundExchange who is offering this royalty rate set at the highest level, the subscription royalty level, from Dr. Pelcovits. Dr. Pelcovits never tried to figure out what the appropriate royalty maximization rate. Mr. Kooker never bothered to figure out what the profit maximization rate. And Mr. McCrady said that he never bothered to figure out what the profit maximization rate is.

Yet they're all asking for a royalty in Dr. Pelcovits's model to be based on the highest possible use of webcasting on a subscription basis.

And, again, that -- even their witnesses agree that they should be looking at a profit maximizing model. But they never did.

Now, Mr. Handzo also was up here saying

that, oh, well, Live365 can pay those rates that were suggested by Dr. Pelcovits's model. They're profitable. We've created a chart, effectively, he refers to numbers that were shown in their findings and conclusions, that show that we would be profitable at every year except the fifth year.

A couple of criticisms about that. First of all, we've never been here to present a royalty rate that would apply exclusively to Live365. That's not our job. That's obviously not your job. We're here to set a royalty rate that a willing buyer and a willing seller would agree in the marketplace that you characterized in Web II, citing Web I. The rate that most webcasters would be paying in a willing buyer/willing selling market.

So we're not focusing exclusively on Live365, which they seem to be holding out as saying that it's much more profitable.

Secondly, we've shown in our reply findings that the chart that they've created that shows we will be profitable at every level doesn't really show that they will be profitable at every level. They've never

presented that evidence in the courtroom. They never gave anybody an opportunity to cross-examine anyone as to how that chart would be created. It was a mathematical computation of, I don't think it was Mr. Handzo, but presumably someone in his office, that simply is not right.

First of all, I mean, I don't want to tire you with all the criticisms because they're set out in our reply findings to that specific chart, but things like our fiscal year is a different fiscal year. So that numbers that were attributed to performances in a particular fiscal year failed to recognize that a lot of those performances actually took place in the prior calendar year at a lower royalty rate, so there are actually more performances, meaning that the numbers just aren't right.

They ignore the fact that that chart doesn't take into account anything to do with capital expenses, depreciation, amortization, rate of return. Instead, they say, even with all these errors, hey, we make a whole 19, I think it's $19,000 next year at the statutory royalty rate. Wow, $19,000. When, again,

we show that the most successful webcaster in the industry would be paying 100 percent of its revenues at the rates that they suggest.

Now, let's talk a little bit about Dr. Fratrik's analysis. And, again, Mr. Handzo keeps talking about how we held out Live365 as a typical webcaster. That we use Live365's data for revenue and faults us for not including the revenue from the other line of businesses that provide services that other companies are out there selling in the marketplace, achieving revenues, for providing these technical back-end services, not having anything to do with music.

But even if we excluded them, it doesn't make any difference because that's not where we got the revenue used in the model that Dr. Fratrik analyzes. That -- as Mr. Handzo said, that revenue figure came from ZenithOptimedia as an industry-wide revenue data. So the fact, whether or not we include anything from Live365's revenue data is completely irrelevant, because that's not the basis of the model that Dr. Fratrik came up with for adducing what the

royalties that a representative webcaster would pay. Not for what Live365 would pay, but for what a representative webcaster would pay.

Now, Mr. Handzo says, oh, well, Dr. Fratrik hasn't justified the subscription revenues that would be coming in. Yet, in fact, as we point out again in our reply findings, the number that Dr. Fratrik uses, slightly over $6 for per subscriber revenue, is actually higher than the per subscription number that Dr. Pelcovits came up and used in his model by about a dollar and a half. Again, it's a benefit to SoundExchange.

He, you know, criticizes us for other numbers, that he hasn't suggested that there are any better numbers out there. The Live365 costs, which is the only factor that is based exclusively on Live365's costs, because we had no other cost data available in the marketplace. There is no AccuStream or ZenithOptimedia from which to get cost data for webcasters. It's not reported to SoundExchange in the documents that we were able to discover.

We relied on Live365, as a company that's

been webcasting for a decade, as having representative costs for what a webcaster would incur in the marketplace.

And he's -- sure, he's critiqued us for our choice of what to include in costs and what not to include in costs. But if we included all of those other costs from the other part of the business, from the other part of the Live365 business, that would actually raise the costs, lowering the costs per performance, again, would have resulted in a lower projected royalty rate, giving a benefit to SoundExchange.

In essence, where Dr. Fratrik is being criticized, the errors redound to the benefit of a higher royalty, not a lower royalty.

Now, Mr. Handzo said, oh, well, Live365 wouldn't be earning a 20 percent rate of return on the services that it provides in -- using this model and its current revenue and royalty rates. That's true. And we don't doubt that.

But what Live365 witnesses have testified is that they've cut back on streaming. Their

performances have gone down because they are concerned about the royalty rates. They've cut back on hiring. They're paying lower salaries than otherwise would take place in the marketplace, in hopes that they can get a royalty rate that would allow them to expand their businesses going forward and eventually earn that 20 percent rate of return.

Again, we're not setting a royalty that presents this rate of return for Live365. We're setting one for what most webcasters would be willing to pay in -- as a willing buyer/willing seller marketplace -- in a willing buyer/willing seller marketplace transaction. So the fact that this particular webcaster would not earn that rate doesn't -- shouldn't be of concern.

Now, Mr. Handzo also says, oh, the 20 percent rate of return, that's not a figure that we can rely on. There are all these other webcasting businesses that have rates of return that are far smaller. Yes, all these other Internet businesses that have rates of return in the single digits are ones that have high warehouse inventory costs, Amazon,

one of the flower services, people that actually have to have bricks and mortar, locations to store inventory in, to deliver it.

We show in our reply findings that Google, a content delivery Internet service, has a 35 percent rate of return. Higher than what Dr. Fratrik uses when he says let's use a 20 percent rate of return. That's similar to other businesses that use audio entertainment, that would be evaluated by investors and bankers and businessmen in deciding whether to enter into a particular line of business. It's a comparable line of business and should have a comparable rate of return.

SoundExchange's witnesses really do nothing to rebut the --

JUDGE WISNIEWSKI: Mr. Oxenford, isn't rate of return related to risk?

MR. OXENFORD: Yes.

JUDGE WISNIEWSKI: What's that risk in the Live365 or representative webcaster business that you have proposed?

MR. OXENFORD: The capital investment in

starting a webcasting business.

JUDGE WISNIEWSKI: And how large is that relative to costs and revenues of the business?

MR. OXENFORD: I know what it is for Live365. Is it in the record? I mean, there are millions of dollars invested in Live365. I'm just -- I would ask my team to see if there is a number that they can provide me. But there are --

JUDGE WISNIEWSKI: I guess the question is, is it comparable to the kinds of investment risks that these other companies that you were just talking about have?

MR. OXENFORD: Well, again, I think it is. And, I think it's --

JUDGE WISNIEWSKI: I thought you said that the other companies had other things, many more things that were more expensive that they had to invest in, such as warehousing costs involved.

MR. OXENFORD: Well, yes. That is -- and I should correct my statement. Yes, that is one factor that you would look at is the costs of capital, of the investment in the business. But there are other,

other factors that are involved in figuring rate of return, including what comparable businesses achieve in the marketplace. And, again, looking at the comparable businesses, in the same type of business that webcasters are, we don't believe that a 20 percent rate of return is unreasonable.

Now, the criticisms of Dr. Fratrik from Dr. Ordover don't provide a more appropriate rate of return. And Dr. Pelcovits and Dr. Ordover both agree that a rate of return is proper. In the Web I case, for a mature webcaster, Dr. Nagle, SoundExchange's witness, said for a mature webcaster a royalty rate of between 12 and 22 percent would be appropriate. And we have, again, offered a figure.

JUDGE WISNIEWSKI: You just said royalty rate.

MR. OXENFORD: I apologize. A rate of return in the area that Dr. Fratrik has suggested would be appropriate.

JUDGE WISNIEWSKI: That's what I thought you meant.

MR. OXENFORD: Thank you. I appreciate any

help I can get.

JUDGE WISNIEWSKI: We just like to keep the record straight.

MR. OXENFORD: Great. Dr. Ordover has not suggested what an appropriate of return would be. He has not suggested what an appropriate cost model would be if we're wrong. He's not suggested that subscription revenue numbers that he criticizes as not being proper should be some other number.

He said, oh, that the ratio of subscription to nonsubscription listeners, which Dr. Fratrik confirmed from several sources, as stated in his corrected written direct testimony, he's not -- Dr. Ordover has not offered any better number, just to say, hey, these aren't good numbers. But anybody can say hey, these aren't good numbers. Unless you can offer something that shows these aren't the best numbers, that these are somehow prejudiced in getting a wrong number, as Mr. Handzo said here today, you can't have perfection. You can work with the best that you've got when you're doing economic modeling. We've provided the best evidence that we have

available as to what the models -- as to what the industry really reflects.

Now, we've also asked for a further -- well, actually, Your Honor, if I may take a moment and confer with my colleagues, I may give you that time that -- you've asked us to be brief and give you some time back here. Let me confer with my colleagues to see if I have other points that I would want to make here.

CHIEF JUDGE SLEDGE: Feel free.

MR. OXENFORD: If I could have a moment.

I think I would just like to make two other points about some of the statements made by Mr. Handzo this morning about the rate proposals of SoundExchange in some of the questioning that went back and forth about how that rate proposal was adopted.

Dr. Pelcovits's testimony is he doesn't know how that rate proposal was adopted. He may know what it was, but his testimony is he doesn't know how that rate proposal was adopted, and where those .02 cent increases in every year comes from. Dr. -- or Mr. McCrady, the only SoundExchange witness who was

able to testify with respect to the litigation -- or to the derivation of the rate proposal, said that it was one that was derived as part of a litigation posture. That essentially, in response to a question about -- from Judge Wisniewski about the trajectory. Yes, it just continued the trajectory of the rates that you had adopted in the previous case, in Web II, without any inquiry as to what the basis of that trajectory was.

That essentially this is not a prediction from the SoundExchange rate committee as to what a willing buyer/willing seller would agree to, but it's a number that came up as a result of a litigation posture.

Mr. McCrady also says with respect to the WSA settlement agreements, those reflect agreements that were agreed to as part of the litigation posture. That they again anticipate not what a willing buyer/willing seller would agree to in the marketplace, but their predictions as to what this court would arrive at as a rate for webcasting, again with the added benefit of, by making it precedential,

they would hopefully ensure that the rates that they arrived at would become, in fact, precedential in the rates this court arrived at.

CHIEF JUDGE SLEDGE: What is the problem with a proposal being presented when witnesses say that that proposal is reasonable?

MR. OXENFORD: I think the problem is that we're not here to set a rate based on what business people in a litigation posture determine is a rate that they want to advance as part of a litigation strategy, as opposed to rates arrived at in a business context as to what a willing buyer or willing seller would agree to as an economic consideration.

CHIEF JUDGE SLEDGE: What source do you have for that view?

MR. OXENFORD: Well, again, your statement in Web II that the rates that would be set are those that a willing buyer and willing seller would agree to in a hypothetical marketplace, the willing buyers being most webcasters.

CHIEF JUDGE SLEDGE: All right. And if the witness says that the rate -- that the proposed rate

is reasonable under that standard, then what is the objection?

MR. OXENFORD: But that's not what the witness said. The witness said that these rates were derived, not as what he believed to be reasonable as a willing buyer, willing seller, but, instead as a matter of litigation posture. Litigation --

CHIEF JUDGE SLEDGE: That's not what Dr. Pelcovits said?

MR. OXENFORD: Well, Dr. Pelcovits did not know how these rates had been developed.

CHIEF JUDGE SLEDGE: You're changing the question.

MR. OXENFORD: Okay. I apologize, Your Honor.

CHIEF JUDGE SLEDGE: The question is, what is the problem with a proposal being presented --

MR. OXENFORD: Correct.

CHIEF JUDGE SLEDGE: -- when witnesses say that the proposal is reasonable under the applicable statutory standard?

MR. OXENFORD: What Dr. Pelcovits said is

that he would justify a rate that would be from .36 down to the .24 or 5 that's the average between the two webcasters -- webcaster settlement agreement agreements.

He did not specifically, I don't believe, say that the rates that were proposed by SoundExchange were reasonable. I believe he testified he knew what they were. But I don't believe he said they were reasonable.

CHIEF JUDGE SLEDGE: He said as long as it was within that range, it was reasonable.

MR. OXENFORD: That's correct. He said a rate within that range. We've argued that that range is not a reasonable range, because it only takes into account the high-priced seats, that the webcaster settlement agreements don't --

CHIEF JUDGE SLEDGE: That's a different issue again.

MR. OXENFORD: Yes, it is. Also, just to make the point, Dr. Pelcovits, in confirming his analysis, in the regression analysis that Mr. Handzo has chosen not to address, when you look at the

standard error there, it would justify rates that were many times many multiples of what Dr. Pelcovits had suggested, down to rates that were a percentage of what Live365 presented.

So, you know, his confirmation as to where that range of rates would lie is a very broad range of rates.

For that reason -- for those reasons, Your Honor, based on the fact that we're in a business that has to be able to make a rate of return, that all parties to this case have conceded, a webcaster has to make a rate of return. A webcaster has to be able to operate a successful business. A willing buyer/willing seller model predicts an economic transaction, not one that's a transaction to subsidize other lines of business, but an economic transaction for webcasting.

At the evidence that's been provided, the industry just does not achieve the level of profitability on a per performance basis that's necessary to pay the royalties that are suggested by SoundExchange, or even to pay the royalties that were

suggested -- that were predicted to be appropriate under the Web II case.

Again, pointing to Mr. Handzo's statements, that the business is decreasing, the rates should go down. If the business is increasing, business is getting better, the rates should go up.

There's nothing in the record to indicate that the business is getting better for webcasters that would justify those rates going up.

It's just common sense that a willing buyer and willing seller would agree to royalty rates that would be appropriate to reflect the marketplace realities.

So I ask that you accept the royalty rate suggested by Live365. Thank you.

JUDGE ROBERTS: Before you sit down.

JUDGE WISNIEWSKI: Yes, before you sit down.

MR. OXENFORD: Oh, okay.

JUDGE ROBERTS: I do have some -- a few questions for you.

MR. OXENFORD: Yes.

JUDGE ROBERTS: I think, when you paused and

consulted with your counsel, by judging from your words, you were going to say something about the aggregator discount. At least that's what I gathered you were starting to say.

I noticed in looking at your proposed findings of fact and conclusions of law that that discount appears in the terms provision.

MR. OXENFORD: Yes.

JUDGE ROBERTS: So are you proposing it as a term or as a rate?

MR. OXENFORD: Well, Judge Roberts, I hadn't really stopped to think about the difference between the rates and terms in this case. I guess I'm proposing it -- we're proposing it as a -- as a rate because it is a proposal for a lower rate for a party that achieves -- that fits within the model that we're proposing.

So I would think that that was an error to put it in the terms section in our discussion.

JUDGE ROBERTS: Okay. So it should be a rate.

MR. OXENFORD: Yes.

JUDGE ROBERTS: Now, with respect to your -- and you've discussed in depth your viewpoint about the value of, in particular, the SoundExchange/NAB agreement. And I understand your arguments about how that's not representative --

MR. OXENFORD: Yes.

JUDGE ROBERTS: -- of the hypothetical marketplace.

But I notice in your proposed findings, with respect to the aggregator discount, you offer up the agreements that Live365 has with the PROs.

MR. OXENFORD: Correct.

JUDGE ROBERTS: And say this serves as a good example of why there should be an aggregator discount.

But if we're looking at the hypothetical marketplace, Live365 is representing a number of services. The PROs are representing thousands and thousands of different copyright owners of musical works. Doesn't that suffer from the same deficiency in the hypothetical -- looking at the hypothetical marketplace, that we would be looking at the wrong

buyer and the wrong seller if we were to follow what you are suggesting?

MR. OXENFORD: Actually, I think the buyer is the same buyer. It's essentially, in the agreements that we discussed, services that are using Live365 as a platform.

JUDGE ROBERTS: Yes. But you're viewing it, though, from Live365's point of view.

MR. OXENFORD: Correct.

JUDGE ROBERTS: And Live365 did the negotiating with the PROs.

MR. OXENFORD: It did, yes.

JUDGE ROBERTS: Not the services themselves that are on Live365.

MR. OXENFORD: That's correct.

JUDGE ROBERTS: And then certainly on the buyer's side, excuse me, the seller's side, with the PROs, you have three organizations, three PROs, representing an enormous amount of copyright owners of musical works.

MR. OXENFORD: Correct.

JUDGE ROBERTS: So there too, you don't

have, in the hypothetical marketplace, the services and the copyright owners.

So if you don't have it in that context, why should you be advocating to us that that's what we should be looking to, but at the same time we shouldn't look to the NAB/SoundExchange agreement because of its deficiency in the hypothetical marketplace?

MR. OXENFORD: Because the economics of the transactions in the aggregator situation are comparable to the economics that we're asking for here.

The economics that are recognized by the agreements --

JUDGE ROBERTS: I'm not asking you, though, about economics. I'm asking you about who is the willing buyer and who is the --

JUDGE WISNIEWSKI: Hold that thought.

MR. OXENFORD: Okay. I'm sure you will ask about the economics.

JUDGE ROBERTS: But I'm asking about the willing buyer and the willing seller. And it seems

that, in advocating the PRO agreements, we have the same problem that you identify that we have with respect to SoundExchange negotiating on behalf of all the record companies and the NAB negotiating on behalf of all the broadcasters.

So again, my question is why is it okay to look at the PRO agreements, and that's okay in the willing buyer/willing seller hypothetical marketplace, but it's not in the marketplace with respect to the NAB/SoundExchange?

MR. OXENFORD: Well, again, looking at the agreements as a whole, the NAB, the WSA settlement agreements, beyond the fact that they're not between the same parties, also have lots of other deficiencies that just don't make them applicable. They're agreements that were entered into under the shadow of litigation. They're agreements that gave benefits to broadcasters, such as lower royalty rates in the years -- there's a whole range of factors that just make them completely inapplicable as a benchmark.

You know, if the only --

JUDGE ROBERTS: Again, I understand the

other arguments. But I -- I'm focused on this one argument that you make with respect to what the deficiency is with the SoundExchange/NAB agreement.

MR. OXENFORD: If the agreements had been offered, the WSA agreements, and had none of these other problems, the only problem was they weren't the same buyer and seller --

JUDGE ROBERTS: Right.

MR. OXENFORD: -- and appropriate adjustments had been made for whatever other factors were placed -- involved in that transaction, maybe they would have some instructive value as to a royalty rate for this proceeding.

But it's the litany of problems that -- with those agreements, that just don't make them comparable to the rates that we're trying to arrive at here.

With these aggregator agreements, with the PROs, essentially what we're talking about is cost savings, which SoundExchange's own witnesses testified, yes, there are cost savings involved by having one reported use, by having one party responsible for paying all the royalties rather than

all these other parties, just like there are in the PRO. The actual transaction is essentially the same transaction that we're talking about in those two cases.

While the WSA agreements, there are just so many differences that are cited in our reply findings, that are cited in our original findings, that just make those WSA agreements totally inapplicable as benchmarks for this proceeding.

JUDGE ROBERTS: Okay. There may be other questions on aggregator discount. I have another question about one of your terms. So I'm going to wait to ask that.

JUDGE WISNIEWSKI: Okay. Let me follow up, then, on the PRO agreement that you were just talking about --

MR. OXENFORD: Sure.

JUDGE WISNIEWSKI: -- with Judge Roberts.

Isn't it true that, in that PRO agreement, the copyright owners get the benefit of the discount? It doesn't go to the PRO? They don't get the money, do they?

MR. OXENFORD: The copyright owners get the benefit of the discount? I'm not sure what you're asking.

JUDGE WISNIEWSKI: Well, who was the PRO representing in that negotiation?

MR. OXENFORD: The PRO was representing the copyright owners.

JUDGE WISNIEWSKI: Exactly. And don't they get the benefit of that discount?

MR. OXENFORD: Well, the benefit of the discount is the webcasters. They get a 20 percent discount off of the normal rates that would be paid to the copyright owners.

JUDGE WISNIEWSKI: Okay. I guess -- I guess I'm not stating it correctly here.

Let me go to the point. Who gets the benefit of the discount that you're proposing?

MR. OXENFORD: Live365, who is paying the royalties for the webcasters.

JUDGE WISNIEWSKI: Is Live365 the licensee?

MR. OXENFORD: For purposes of the SoundExchange royalty, yes, it is.

JUDGE WISNIEWSKI: But your proposed regulations don't state that. If you look at your proposed regulations, you say that the aggregator discount goes to the qualified webcast aggregation service.

MR. OXENFORD: Yes. And the qualified webcast service is one who aggregates programming from -- and I don't have the terms right in front of me.

JUDGE WISNIEWSKI: Well, I have the other definitions that you have listed here. It says the webcast aggregation service is a streaming service that operates a network of at least 100 independently operated aggregated webcasters.

MR. OXENFORD: Correct.

JUDGE WISNIEWSKI: Okay. If we look to the definition of aggregated webcasters, it says that it means that it's an individual business organization or other legal entity that individually streams less than 100,000 ATH per month of royalty-bearing performances and utilizes a webcast aggregation service.

Isn't the fact that if you say that this is

a webcaster who streams, they are in fact the licensee?

MR. OXENFORD: I believe that the regulations that we provided with our findings and conclusions make it clear that Live365, the aggregator, would be the licensee responsible for the royalties.

JUDGE WISNIEWSKI: They do not. That's why I'm raising the question.

MR. OXENFORD: Okay.

JUDGE WISNIEWSKI: And I've raised it throughout this proceeding. What you have here is essentially an amount of money going to someone who calls itself a webcast -- qualified webcast aggregation service, but is not in fact the party who streams, and, therefore, is not the licensee the way these regulations are constructed. That's how I read them.

MR. OXENFORD: Well --

JUDGE WISNIEWSKI: And if they don't say that, then they certainly at least say that both that service and the aggregated webcaster stream, and

therefore both would be licensees.

MR. OXENFORD: Judge Wisniewski, I'll need a moment to look at these. I'll, if I could, address this in my reply. I don't believe that that's what it says, but you certainly do. I would need to just parse each sentence. And rather than standing here trying to do that, perhaps I can address it in whatever time I have left in --

JUDGE WISNIEWSKI: Well, then tell me this. At least as you understand it, who gets the money? Who gets the discount?

MR. OXENFORD: Live365 is paying the royalties, so they would pay a lesser amount, or any other qualified aggregator who brings together 100 independently operated programming services from webcasters.

JUDGE WISNIEWSKI: And, therefore, those programming services do not get the benefit of that? Do those programming services, for example, pay a royalty fee?

MR. OXENFORD: They would not be paying a royalty fee to SoundExchange.

JUDGE WISNIEWSKI: So they would simply be one licensee?

MR. OXENFORD: Correct. One licensee.

JUDGE WISNIEWSKI: In your understanding of this.

MR. OXENFORD: Oh, no question. That is our proposal. That there be a single licensee. That licensee would be Live365. Live365 would be responsible for the payment of the royalties. And if they meet the criteria that we've set out, they would be entitled to a discount.

CHIEF JUDGE SLEDGE: Where in your proposed regulations is there an exemption for licensees who are customers of Live365 not to pay royalties?

MR. OXENFORD: Well, the party who is actually streaming the service to the customer is Live365.

JUDGE WISNIEWSKI: But your definition doesn't say that.

CHIEF JUDGE SLEDGE: That didn't answer my question.

JUDGE WISNIEWSKI: Your definition -- I'm

sorry.

CHIEF JUDGE SLEDGE: Where in your proposed regulations is there an exemption for a licensee who contracts with Live365 not to pay royalties?

MR. OXENFORD: Well, again, respectfully, Your Honor, the licensee would be Live365. It would not be an independent webcaster.

CHIEF JUDGE SLEDGE: That's not what your proposed regulations say.

MR. OXENFORD: And I think we're almost having the broadcaster/webcaster kind of problem with terms.

CHIEF JUDGE SLEDGE: We've been struggling with you on this issue from the beginning of this proceeding. And it's still -- it's still a major issue.

JUDGE WISNIEWSKI: And I suggest that you go back and take a look at your own definition of aggregated webcaster, which you are now talking about as some sort of ethereal service, programming service, when in fact it says that they're the entity that individually streams. That's what your definition

says, sir.

MR. OXENFORD: Again, I need to look at the definition. My understanding of the definition is that Live365 is the service. There are webcasters who may provide programming.

JUDGE WISNIEWSKI: That may be what you intended. It's not what you accomplish in these proposed regulations.

MR. OXENFORD: I will look at the proposed regulations and answer that question in whatever reply time I may have.

JUDGE WISNIEWSKI: Thank you.

JUDGE ROBERTS: I have one more question, Mr. Oxenford.

MR. OXENFORD: Oh, I'm sorry.

JUDGE ROBERTS: And that, remember I said it was about a term.

You stated in your proposed findings that with respect to SoundExchange's proposal for a late fee for the late reports of use, that there was no authority for us to adopt that type of term.

We have, however, adopted a late fee for a

late statement of account. And that already exists in the regulations. So I'm wondering if you believe that that, therefore, that late fee for a late statement of account, that we were without authority to adopt that term as well.

MR. OXENFORD: My recollection of the statutory language is that we're allowed -- that you're allowed to adopt a late fee for a late payment.

I don't know where the authority would come from for adopting a late statement of account. So -- and I hesitate to say that you've adopted a regulation without authority.

JUDGE ROBERTS: I understand. But I just wanted to know if that necessarily followed from your position that we don't have authority to adopt a late --

MR. OXENFORD: My recollection of the statute, it is -- it says that you have the authority for late fee -- late fees for late fees.

JUDGE ROBERTS: Yes. I'm looking at the late payment. It says that a determination may include terms with respect to late payment. And your

view is that payment is only the actual money itself?

MR. OXENFORD: It's payment. Yes.

JUDGE ROBERTS: Okay. All right. Thank you.

JUDGE WISNIEWSKI: Actually, I do have one further question.

MR. OXENFORD: I may not have any rebuttal time to respond.

JUDGE WISNIEWSKI: This also has to do with a proposal related to the aggregation service.

We talked earlier about justifications for having different rates in the market.

MR. OXENFORD: Yes.

JUDGE WISNIEWSKI: I guess the question that presents itself is is there some particular reason why the programming that's presented through this aggregation service is somehow less competitive than the programming that is presented by other commercial webcasters, broadcasters, simulcasters and so forth?

MR. OXENFORD: Is less competitive?

JUDGE WISNIEWSKI: Is different in some competitive sense.

MR. OXENFORD: I mean, there is testimony in the record that this aggregation service provides many parties the ability to stream multiple types of music that may not be the mainstream music that's most valued in the market.

I don't believe there's any quantification that's provided that these streams are less valuable per se. But there certainly is testimony that we're streaming some less commercial types of music that would not otherwise be streamed.

JUDGE WISNIEWSKI: Because, essentially it seems to me you're asking us to separate -- set up a separate category here.

MR. OXENFORD: Correct.

JUDGE WISNIEWSKI: And it seems to me that, so far as we have that in past proceedings, for example, the last proceeding, that was largely done in the context of price discrimination and the basis for price discrimination. I don't see that here.

MR. OXENFORD: Well, the proposal here is based principally on the acknowledged fact that it is a benefit to the collective to have one service paying

for multiple smaller entities that otherwise may not be able to meet the royalty obligations or may cause some additional costs to the collective.

JUDGE WISNIEWSKI: But if I'm selling a uniform product, the fact that some of the folks I'm selling it to might be easier to deal with than others, doesn't mean I'm going to change my price. That's the market price.

MR. OXENFORD: Well, it may. It may if you're able to deliver in bulk as opposed to --

JUDGE WISNIEWSKI: Well, that's presuming I've got market power. In fact, if we are in a hypothetical market and we're in competitive situations, then that wouldn't be the case.

MR. OXENFORD: Well, actually, I think it would be, though. I mean, if I was delivering widgets and I could deliver my widgets to one buyer in one truckload rather than to have 10 truckloads, I might be able to negotiate a different rate.

If that buyer has one location rather than 100 locations around the country, so it's only going to one place, I might be able to offer a lower rate.

If the one buyer is acting as a buying agent on behalf of hundreds of coops --

JUDGE WISNIEWSKI: That may be true in an individual situation. I don't dispute that that might not be true in an individual situation.

MR. OXENFORD: Right.

JUDGE WISNIEWSKI: But here what you're talking about it setting up a category that applies across a whole market.

MR. OXENFORD: Correct. For anyone who meets that -- provides that benefit to the collective.

JUDGE WISNIEWSKI: And if there are thousands of such entities, then clearly they would all have to meet that criteria?

MR. OXENFORD: Right. If they meet the criteria that we provide and provide those benefits to SoundExchange, yes, they would be entitled to that discount because they provide that benefit.

JUDGE WISNIEWSKI: That comes back to the same point that I made before. On the whole or on average, is there anything that would cause us from an economics point of view to price-discriminate between

that category and -- that regular category of commercial webcasters we have, or the category of noncommercial webcasters that we have?

MR. OXENFORD: The -- again, the justification is that it saves money to the collective and to the copyright owners.

JUDGE WISNIEWSKI: I think we're going around in circles. Thank you.

MR. OXENFORD: Thank you.

CHIEF JUDGE SLEDGE: Which portion of the license -- of the 114 license would this category fit? Is it a noninteractive transmission? Is it a new service?

MR. OXENFORD: No. It's a noninteractive transmission.

CHIEF JUDGE SLEDGE: Not claiming to be a new service?

MR. OXENFORD: No. I mean, we are essentially no different than Yahoo was in Web I, who was an aggregator of many other content creators' content. In Web I, Yahoo, that was deemed to be the model for the statutory royalty, was an aggregator of,

in fact, many broadcasts, simulcasts, and also some pure webcasts.

CHIEF JUDGE SLEDGE: Any other questions?

Thank you, sir.

MR. OXENFORD: Thank you.

CHIEF JUDGE SLEDGE: How much time is remaining?

JUDGE ROBERTS: 10 minutes.

CHIEF JUDGE SLEDGE: You have 10 minutes remaining.

Mr. Malone, for our order of presentation, you were awarded the spot that everybody else wanted, of being last. And now you get the additional benefit of having a break and nourishment before your presentation.

We will recess for one hour.

MR. MALONE: Thank you, Your Honor.

(Whereupon, at 12:24 p.m., the hearing was recessed, to be reconvened at 1:24 p.m. this same day.)

AFTERNOON SESSION

(1:24 p.m.)

CHIEF JUDGE SLEDGE: As IBS is not present, does CBI want to go ahead and present at this time?

MR. DUMAS-EYMARD: Yes, Your Honor.

Your Honor, my name is Aymeric Dumas-Eymard. I'm appearing today on behalf of College Broadcasters, Incorporated.

CBI has voluntarily entered into a settlement agreement with SoundExchange. We believe the terms of that settlement are reasonable. The agreement provides for the same minimum fee that was adopted by this board in Webcasting II.

Most significantly, it also provides for the payment of a flat auditable fee in lieu of recordkeeping, which assures noncommercial educational webcasters, that they will not incur more than a nominal additional expense beyond the minimum fee. CBI therefore respectfully requests that the board adopt the rates and terms of the CBI/SoundExchange settlement agreement as the statutory terms and rates for noncommercial educational webcasters.

CBI respectfully rests on its papers, and I thank Your Honors for your attention.

CHIEF JUDGE SLEDGE: Questions?

JUDGE ROBERTS: One question. Actually two, I guess. Counselor, how do you pronounce your name?

MR. DUMAS-EYMARD: Aymeric Dumas.

JUDGE ROBERTS: How do you spell your last name?

MR. DUMAS-EYMARD: It's D-U-M-A-S.

JUDGE ROBERTS: In your agreement you are proposing a different category, something that you have identified as educational, noncommercial educational webcasters. Is that correct?

MR. DUMAS-EYMARD: That's correct, Your Honor.

JUDGE ROBERTS: That is separate from noncommercial webcasters?

MR. DUMAS-EYMARD: Yes, Your Honor, it is.

JUDGE ROBERTS: Okay. I just wanted to be clear on that. Thank you.

CHIEF JUDGE SLEDGE: Thank you, sir.

MR. DUMAS-EYMARD: Thank you, Your Honor.

CHIEF JUDGE SLEDGE: All right, Mr. Malone. I see you've come in. We'll proceed with yours.

CLOSING ARGUMENTS ON BEHALF OF

INTERCOLLEGIATE BROADCASTING SYSTEM

MR. MALONE: I was reminded, Your Honor, of the biblical verse that says the last shall be first and the first shall be last. But I don't know what that makes you.

CHIEF JUDGE SLEDGE: I've wondered that question a lot myself.

MR. MALONE: If Your Honors please, in my opening statement to you some months ago, I said that we felt a little bit left out of this. That everybody seems to have a special rate to themselves and that we're being put in the default position. And whether or not that's true, the point is, I think, that the -- none of the various alternatives solves the two principal problems that we have in enabling students in a volunteer context, both in high schools and in colleges, from, you know, experimenting with that aspect of Internet operation that they can choose to be exposed to.

And the use of music here is not a matter of delivering it for a price or for a profit, but rather is a -- is an instructional mechanism that enables -- keeps the volunteers interested and gives some purpose in their volunteering, more purpose perhaps than they see in an algebra class or the like.

The -- I think there are three principal issues that I will address. And then at any point you of course have the prerogative of interfering -- or interrupting me.

I think the first place to start is with the money. That is, with the rates. And the per minute rate for commercial stations is one that we can live with. It's the $500 minimum rate that we can't live with.

Now, Mr. Handzo I think pointed out that the best figures we have on station income is $9,000 a year on the average. And that is of course a -- an average. And that means there are, roughly speaking, as many stations that have less than the average than have more.

And the -- it's very well and good to say,

well, the average station can -- you know, this does not divert them from their educational purpose. But it doesn't say anything about the total population that that averages. So we're worried particularly about the college stations that have annual incomes of less than that, the ones who collect nominal dues from their volunteer members and try to run on that. And there are others who have fundraisers of various sorts, sponsoring campus bands and the like, and from which they derive some profit.

But that's really not -- in fact my experience with undergraduates is they don't worry about money. I guess their parents have always done that for them. So it is for them an experience in having to budget and live by the budget.

And the -- none of the stations has the ability, at least legally, to send these -- the number of dollars they have to two or three different objects by cloning paper currency.

So if, as Mr. Murphy from the University of Connecticut testified, there is -- that's a point of great -- I can say concern, but I think it doesn't

overstate it to say a point of great apprehension that he runs into in the IBS national and regional conventions that he has attended.

And I think that, you know, it's just not an infinitely expansible resource. So I think the $500 is disproportionate to the amount of use that the -- the stations make of -- of not -- well, of recorded -- digitally recorded music, which is not under a direct license from the -- for an on-campus broadcast, for instance.

The station has the direct permission of the -- of the band to broadcast their music because they value the promotional value of it. And for starving artists, why, they need exposure more than they need the few cents that would result from a performance over a station that has an average number of listeners at any given time of four.

And the -- the point here is simply that there's just a disproportion between the small volunteer operations that may operate only a few hours a day, five days a week. And it's particularly a stumbling block and an obstacle to their exercising

their abilities in this area if they're a start-up where they have no money at all to speak of.

And a lot of stations over the past 60 years, 70 years, have been, you know, start-up groups, that some students have gotten together and, hey, fellows, there's this -- and gals, now -- there's this new technical capability that we can share, you know, records with various other people in our dorms during certain times of the day, when we're all supposed to be studying.

And the purpose is different. The use is different. The impact is quite different.

And I think that the question, as I read the statute, is that the -- the statute talks about types of users. And I think our position has to rest in part on the proposition that these small college stations do not have very much in common with a commercial webcaster or some of the big NPR affiliates who stream, you know, not to four listeners at any time, but to tens of thousands of listeners.

And if you look at 114(f)(2)(A) and (B) and -- well, that's principally it, the -- you know,

Congress hasn't given us much help on the definition of the word "type." But I think they're looking for a -- the board to segregate different kinds of operation. And I think the statute may even be read as a mandatory, shall distinguish, and words to that effect. Recognition of these -- these kinds, these various kinds.

And as I say, when you begin to look at all the other negotiated arrangements -- may I sit, please?

CHIEF JUDGE SLEDGE: Yes, sir.

MR. MALONE: That they've -- obviously SoundExchange has been chopping this up into pretty fine, different categories of ratepayers or of users.

And I think that that may give, as a practical matter, maybe a practical lead to this Court as to the content in the -- in the business they're in of recognizing different types of webcasters.

And so I think that -- I think that's about the most one can get out of section 114(f)(2).

The --

JUDGE ROBERTS: Well, Mr. Malone.

MR. MALONE: Yes.

JUDGE ROBERTS: I actually get a bit more out of --

MR. MALONE: Okay.

JUDGE ROBERTS: -- section 114(f)(2)(B). And that is in the statutory language itself, it does say that we are to distinguish between types. But in making that distinction, the statute says: "Such differences to be based on criteria, including but not limited to, the quantity and nature of the use of sound recordings and the degree to which the use of the service may substitute for or may promote the purchase of phonorecords by consumers."

I want to look at, first, the portion that says the quantity and nature of the use of sound recordings.

MR. MALONE: All right.

JUDGE ROBERTS: What evidence have you put into the record on this question as to the quantity and use and the nature of the use of sound recordings to support your request for these two different types of services; namely, small commercial, noncommercial

webcasters and very small noncommercial webcasters?

MR. MALONE: In distinguishing between those two subgroups?

JUDGE ROBERTS: Yes.

MR. MALONE: All right.

JUDGE ROBERTS: You're asking for different rates, different minimum fees -- I shouldn't say rates. Different minimum fees for those two categories, small noncommercial webcasters and very small. And I'm asking you what evidence has been put into the record on the quantity and nature of the use of sound recordings as applicable to those two different types of services? Since the statute says we have to look at that, among other things.

MR. MALONE: All right. The difference between the two, the small and very small, is that there's ample evidence that stations who do not exceed the number of performances per year for the lower rate are -- that immediately segregates out everyone with a bigger audience.

In this case, certainly the sharpest contrast between this and the larger stations is that

four is just very, very small.

And the -- there are some stations that will exceed the four, but not by very much. And I think that's simply based on the experience of IBS's officers, over the 50 years for some of them, in interfacing with student bodies.

And the point here, I think, in, you know, it's -- you know, certainly a technical objection to your argument is that it's the disproportionality between the $500 rate which will, you know, get you a hundred thousand performances or so, and the amount of use of the music measured by the number of listeners at any given time.

And the -- you know, the stations, as we talk to them, are willing to -- willing to pay the per unit rate that's set out --

JUDGE ROBERTS: Mr. Malone, I'm going to have to interrupt you because you're not answering my question.

My question is what evidence is there that we have in the record about the quantity and the nature of the use of sound recordings by these very

small noncommercial webcasters and small noncommercial webcasters that would enable us, as the statute says, to make that type of distinction between small, very small and simply noncommercial webcasters?

MR. MALONE: Well, Your Honor, the record does not provide the modal values on this spectrum. So I have to say that the argument for drawing a line between the small webcasters and the very small webcasters is simply the -- the amount of use. And that's what the definition sets up as a hurdle to getting into that category.

JUDGE ROBERTS: So with respect, then, to at least the nature of the use of sound recordings, you're acknowledging that we have nothing in the record on that question?

MR. MALONE: I think that's true, Your Honor, that we are not in a position to distinguish for you stations along that spectrum.

JUDGE ROBERTS: Okay.

MR. MALONE: That fine grain.

JUDGE ROBERTS: Well, given that there is no evidence on the nature of the use --

MR. MALONE: Well --

JUDGE ROBERTS: -- and the statute requires a consideration of that, how then can we make a distinction as to the two types of services that you're asking for?

MR. MALONE: I think it would be very difficult. And one has to take into account other factors.

JUDGE ROBERTS: Well, how can I take into account other factors when the statute is telling me I have to take this into account?

MR. MALONE: Well, I think that Congress's language in that subparagraph, I guess, is pretty intentionally loose to give you the -- that's almost an ad hoc call in this particular area.

It does seem to us that it would be unfair to SoundExchange not to at least pay for the minutes of use that we do use. And this, I think, gets the two big groups of small webcasters sorted out as a practical matter.

You know, it's --

JUDGE ROBERTS: I'm going to ask this

question one last time. And that is that with respect to the quantity and nature of the use, in particular the nature of the use of sound recordings, you acknowledge that there is nothing in the record to tell us about the nature of the use of sound recordings of very small -- the two categories that you propose, very small noncommercial webcasters and small noncommercial webcasters.

But you're telling me that I don't need to make any call or determination as to the nature and the use, and I still should nevertheless find that these two qualify as a different type of service.

MR. MALONE: Differentiating between the two subcategories.

JUDGE ROBERTS: That's your position?

MR. MALONE: That's right. We can differentiate ourselves from the big boys.

JUDGE ROBERTS: Okay.

MR. MALONE: But I don't know of any objective data that's available that would enable you to differentiate between stations that are eight or less or 20 or less other than the fact that, you know,

the drafting was done by people in the -- in the college radio industry who are fairly familiar with how these stations operate. And there clearly is going to be a difference implied by the difference in the hours of performance, because the staffing is going to be very different.

You know, you're talking about a fairly intelligent and intensive volunteer who is able to run the station and get audiences up in the area of 20. That's almost -- you know, I think a lot of stations would be very happy to do that. And it may vary from year to year because, you know, students come, students go. Mr. Murphy mentioned the turnover in volunteers. And that's certainly a factor.

And I think it's extremely difficult for a, you know, a beginning staff or a small volunteer staff to push their figures up in the area of 15 to 22 listeners.

JUDGE ROBERTS: But we have nothing in the record on the nature of the use of sound recordings by small and very small noncommercial webcasters?

MR. MALONE: Other than what I've offered, I

don't think there's evidence in the record that enables you to differentiate between the two as, you know, small --

JUDGE ROBERTS: The nature of the use.

MR. MALONE: Yeah.

JUDGE ROBERTS: All right.

JUDGE WISNIEWSKI: Mr. Malone, before you resume, you had mentioned something that repeats some information that was in your last rate proposal.

MR. MALONE: Yes.

JUDGE WISNIEWSKI: That is, in your last rate proposal at page 2, under per performance rates, it simply says "as proposed by SoundExchange."

Would you clarify for me, because based on the way you've presented your case throughout, and your arguments here this afternoon, it sounds like you do have, in fact, a difference between SoundExchange on the per performance rates.

If you look at SoundExchange's proposal itself, for noncommercial webcasters, who make transmissions of not more than 159,140, they ask for a flat rate of $500 per annum. That is separate and

apart from their minimum fee part of the proposal.

As I understand it, you're not -- you wouldn't be happy with $500.

MR. MALONE: Our smaller stations cannot live with that.

JUDGE WISNIEWSKI: So, in fact, it's not just the minimum fee that you'd like to be these numbers. It is also the fee they would pay under the per performance rate?

MR. MALONE: What --

JUDGE WISNIEWSKI: Or am I missing something?

MR. MALONE: No. I think what we're prepared to do is pay the per performance rate. But we aren't prepared to pay for the thousands of performances that we would be paying for and not getting in the hands of listeners.

JUDGE WISNIEWSKI: So you would take the per performance rate that is in the SoundExchange proposal --

MR. MALONE: For the overage.

JUDGE WISNIEWSKI: For the over amount, and

pay that irrespective of the ATH that you broadcast; is that correct?

MR. MALONE: Well, as long as you stayed in the same category.

JUDGE WISNIEWSKI: In the 159,000 category.

MR. MALONE: That's correct, Your Honor. In other words, you know, the numbers of listeners that we're talking about here is just not a barrier to entry as the $500 is a barrier to entry.

JUDGE WISNIEWSKI: I thought that's what you were talking about. It's not clear from your proposal.

MR. MALONE: Thank you for giving me the opportunity to make it clear.

Now, there's another barrier to entry here which is adverted to by a couple of our witnesses, and that is the recordkeeping. Mr. Murphy says there are just a lot of stations that are not automated and don't -- being automated would deprive them of their educational ability.

So that if you institute a recordkeeping requirement that requires automation, then you're

changing one of the fundamental aspects of the college radio volunteer-type operation. And, again, there's precedent to look for. And that's in the CBI/SoundExchange agreement, which gives three alternatives as to the recordkeeping and reporting. And that threefold alternative would be, I think in the views of our station managers and station staff, would be a -- an ideal sort of choice to be put to.

The feeling is that $100 is not as much a barrier to entry as $500. And there are cost-free, I guess -- well, strike cost-free. There are price-free alternatives there in terms of also the sampling recordkeeping, and then of course the census reporting which is -- you know, that's just something that some of our stations lack the technical ability and the staffing ability to do.

I mean, if -- and so I think that, again, if we could get the $500 obstacle taken care of one way or another, that the -- and have the same choice as SoundExchange has given the larger stations in the -- under the CBI agreement, that would substantially solve that obstacle to small station participation.

And, you know, I don't think that --

JUDGE ROBERTS: So to be clear on that, Mr. Malone, then your stations would be willing to pay the $100 fee in lieu of having to submit the reports?

MR. MALONE: I think all but the very smallest would be able to. Those may not come up on the radar.

The -- I guess the next issue that I would like to address is the joint motion of SoundExchange and CBI to have the board adopt the rates in that agreement for a default position.

And the -- this is a very peculiar vision in the sense that it doesn't mean anything to CBI. They think that the agreement itself will take care of their stations' problems. And I think that's probably quite so, given the profile of their membership.

The -- but I don't think that -- over and beyond that, I don't think that all the statutory prerequisites have been met for the board's acting favorably on their motion.

First of all, you know, IBS is objecting. And certainly at this end of the station spectrum, we

represent the majority of the small stations. And so the board is simply rejecting the -- not adopting the interests of the -- of a substantial, presumably a majority part of the college radio segment.

And the -- also, it's not clear to me that -- you know, they bring in support from 24 letters to the board, which they assembled. And this, I think, goes to the same point that the question to me at the closing of that day's -- or at least the closing of one of the hearings. And that is, we didn't ask for it. We thought that, first of all, the judges here are sitting in sort of a mixed adjudicative, rule-making posture. And I don't think, you know, this is the kind of evidence that goes into the Court's decision as to whether they should proceed to consider that it's adopted.

The statute writer has very carefully divided that into two different segments, little i and little ii. And the first, it's when the petition hits your -- your doorstep, the -- there can be written submissions from the public, if you will, as to whether the board ought to consider the motion in an

adjudicative context, that is in the hearing.

And the second provision says that, you know, only -- only objector -- only parties can file objections, which certainly are a higher status on the evidence tree than just comments by nonparties.

So that we don't think that what we have in those 24 letters is persuasive.

The -- nor I suggest can the -- I think the first step, that is, of getting the judges to consider the motion, has been taken. And certainly the letter writers have no objection to that.

Then when we move to the second phase, I don't think they have any standing to object if they aren't parties.

So, you know, this is either a careless draftsman or one who's got a very precise sense of what the various words are intended to mean in this statute.

And we don't think that -- we don't think that either the movant, one of the co-movants or the -- you know, I just don't think that CBI -- it gets them nothing to have the rate adopted. They've

already gotten to their rate guaranteed by publication in the Federal Register as a result of the filing agreement. And extending it to other parties at large, or other operations at large doesn't -- it's no skin off their nose either way.

Now, the -- well, I think I've intimated before my views as to why the agreement was set up and has the provision of making it not subject to the nondisclosure requirements.

JUDGE ROBERTS: Mr. Malone --

MR. MALONE: Yes.

JUDGE ROBERTS: -- are you still objecting to the adoption of the CBI agreement?

MR. MALONE: Well, the -- if that -- that's -- in a sense, that's no skin off of the bigger IBS members' noses. But to the smaller --

JUDGE ROBERTS: I'm asking you. When we published it, you filed an objection.

MR. MALONE: We did.

JUDGE ROBERTS: Are you still standing by that objection?

MR. MALONE: We are still standing by the

record that we have made to date.

JUDGE ROBERTS: Are you still standing by your objection?

MR. MALONE: Well, if you're -- if you're asking by --

JUDGE ROBERTS: I'm asking you if you object to the adoption of the CBI agreement?

MR. MALONE: We do object to the secondary effects in terms --

JUDGE ROBERTS: Do you object to the -- I don't know how I can ask this plainer? Do you object to the agreement? You filed an objection with us. I'm asking you, do you still object?

MR. MALONE: We object because it excludes us by the $500 minimum.

JUDGE ROBERTS: Okay. I don't understand that. And here is why I don't understand that. The CBI agreement asks for the delineation of a category identified as noncommercial educational webcasters and provides a definition for that and sets forth that the $500 fee is to apply to a noncommercial educational webcaster.

In your case, you have proposed for us to adopt two new types of services.

MR. MALONE: Yes, Your Honor.

JUDGE ROBERTS: The small noncommercial webcaster and the very small noncommercial webcaster.

MR. MALONE: That's right.

JUDGE ROBERTS: What interest of it is your -- is it of you to object to an adoption of noncommercial educational webcaster when you're proposing two different -- completely different services?

MR. MALONE: Well --

JUDGE ROBERTS: You're not proposing a rate for noncommercial educational webcasters. Only CBI and SoundExchange are.

MR. MALONE: Right.

JUDGE ROBERTS: So why are you objecting to our adoption of that if you have a -- two separate categories that you want adopted?

MR. MALONE: Well, the judges can certainly say that -- I mean, there's nothing incompatible with them. The --

JUDGE ROBERTS: But I'm asking you why are you still objecting to the adoption of a $500 minimum fee for noncommercial educational webcasters when you have proposed new fees for two new types of services and have not proposed a fee for something called a noncommercial educational webcaster?

MR. MALONE: Well, our --

JUDGE ROBERTS: Where is your dog in that fight? I don't see it.

MR. MALONE: All right. The dog in that fight is -- and, again, excluding indirect effects that I understand to be the context of your question.

We have no objection to the terms that are there as long as they don't apply to our small stations.

JUDGE ROBERTS: So you're just objecting to it on the theory that you just hope that what's ever in there doesn't somehow get applied to your case, even though you're asking for two completely different services?

MR. MALONE: That's essentially correct, Your Honor.

JUDGE ROBERTS: All right.

MR. MALONE: I think the -- I think that basically hits the points of our case that might cause some of the most question. And I think, at this point, I will simply complete my remarks with the request that we have a clear path for these stations to operate without having to undergo restructuring of their academic or their educational program, and, again, at a price and with ancillary recordkeeping requirements that they can live with.

CHIEF JUDGE SLEDGE: Thank you.

Mr. Handzo, any further argument?

REBUTTAL CLOSING ARGUMENTS OF SOUNDEXCHANGE, INC.

MR. HANDZO: Briefly, Your Honor.

Just two points, if I may. First of all, I wanted to respond to Judge Roberts' question about our interpretation of the Webcaster Settlement Act and whether there was legislative history that we were referring to.

And the answer is, no, we were referring to the text of the statute itself, which we think supports that interpretation. But there isn't some

additional legislative history that we hadn't cited you to.

JUDGE ROBERTS: Okay.

MR. HANDZO: The second point was in response to Mr. Oxenford's argument about Dr. Fratrik, that all of the mistakes that he made favored SoundExchange. That's really actually not true.

For example, he has this assumption of a 20 percent operating return which is, in our view, clearly a mistake, and certainly not one that favors SoundExchange.

But the broader point is that if you correct those mistakes that allegedly were made in favor of SoundExchange, what you wind up getting is a nonsensical result, a result where the sellers have to pay the buyers to use the market.

So all it shows, if you do that correction, is that his model makes no sense.

And then I think I'll just end where Mr. Oxenford began, which is citation to "The Dark Arts of Mathematical Deception."

I probably don't need to argue at length to

the Court that I don't know enough math to practice the dark arts of mathematical deception. I think that SoundExchange's evidence is straightforward. And we would ask the Court to adopt our rate proposal and terms.

Thank you.

JUDGE WISNIEWSKI: Mr. Handzo, before you go, just a quick question. Do you happen to have your rate proposal before you?

MR. HANDZO: Someone in this room has to have it.

I do now.

JUDGE WISNIEWSKI: Just as a matter of clarification. On page 12 of your rate proposal, under minimum fee.

MR. HANDZO: Yes.

JUDGE WISNIEWSKI: Paragraph 1 relates to commercial webcasters. Paragraph 2 to noncommercial webcasters.

MR. HANDZO: Right.

JUDGE WISNIEWSKI: It looks to me like whoever drafted this did a cut and paste with the very

last sentence that's changed, last full sentence that's changed there, and still references commercial webcasters under the noncommercial webcasters paragraph.

Am I correct in assuming that that's an error?

MR. HANDZO: I'm not seeing that.

JUDGE WISNIEWSKI: I'm looking at the sentence that reads: "For each such commercial webcaster, the annual minimum fee described in this paragraph shall constitute the minimum fees due under both 17 USC 112(e)(4) and 114(f)(2)(B)."

MR. HANDZO: Yes. I think the answer is that was a mistake. It was actually corrected. We submitted a corrected version on July 14th, I believe.

JUDGE WISNIEWSKI: Okay.

MR. HANDZO: We'll make sure you have that.

JUDGE WISNIEWSKI: Well, as long as you tell me. It's a small thing. But I just want to make sure I understand what you're asking for.

MR. HANDZO: Thank you.

CHIEF JUDGE SLEDGE: Mr. Oxenford.

REBUTTAL CLOSING ARGUMENTS ON BEHALF OF LIVE365, INC.

MR. OXENFORD: Thank you. You didn't give me a lot to reply to.

Judge Wisniewski, let me see if I can explain the question that you had about the aggregator.

The definition of licensee in the proposed regulations talks about a licensee is a person that's obtained a statutory license to make eligible nonsubscription transmissions or noninteractive digital transmissions as part of a new subscription service.

In the statute an eligible nonsubscription transmission is a noninteractive, nonsubscription digital audio transmission not exempt under (d)(1) that is made as part of a service that provides audio programming.

Our definition of a webcast aggregation service is a streaming service that provides a network of 100 independent aggregated webcasters. The aggregation -- the definition of aggregated webcasters is an individual, business, organization or other

entity that streams less than 100,000 ATH of royalty-bearing performances and utilizes a webcast aggregation service.

So the service that's providing the nonsubscription transmissions is the licensee who is paying the royalty.

The aggregated webcasters are not themselves services.

JUDGE WISNIEWSKI: So under your interpretation of the regs as they currently stand, or as you propose them, one would always have to be a service to be a webcaster for our purposes?

MR. OXENFORD: To be paying the royalty rates that we're establishing, that's correct. You would have to be a service. And in fact, I believe that's in 114(f)(2)(A), says that this proceeding is to determine reasonable rates and terms of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmission services.

Again, you've got to be a service.

JUDGE WISNIEWSKI: And how are the said

services defined?

MR. OXENFORD: Well, the word "service" is not itself defined. But the only reference to a service in connection with an aggregation is in connection with the aggregation -- webcast aggregation service --

JUDGE WISNIEWSKI: But there are surely individual webcasters out there, right?

MR. OXENFORD: Sure.

JUDGE WISNIEWSKI: So they're regarded as services for purposes of the act under your theory here.

MR. OXENFORD: Right. But they are not aggregated webcasters under the definition provided here unless they use a service, the one that's actually streaming, an aggregation service that's actually streaming.

JUDGE WISNIEWSKI: So you're saying that, under your definition in B, it is the second half of the sentence that satisfies the condition that you are seeking to obtain here?

MR. OXENFORD: I'm sorry. B? Which B?

JUDGE WISNIEWSKI: Your definition of aggregated webcasters that you were just referring to. It's the "and" portion. "And utilizes a webcast aggregation service" --

MR. OXENFORD: Correct.

JUDGE WISNIEWSKI: -- that makes this different.

MR. OXENFORD: That's correct.

JUDGE WISNIEWSKI: And without that, then that would not be the case?

MR. OXENFORD: If you and I were out there not using a webcast aggregation service, if I was out there just streaming my own service, I would be a service.

If I stream it through a webcast aggregation service, I am not the service. The aggregation service is the service.

JUDGE ROBERTS: I have to say, Mr. Oxenford, I'm still confused based on the language you're offering here, proposed regulatory language. Because you have a definition of a commercial webcaster, and you identify that person as the licensee.

Now, throughout your proposed findings, and, indeed, throughout this case, you've talked, and your witnesses have talked, about Live365 and all the webcasters that Live365 has on the service.

Now, if we -- if this language says that a commercial webcaster is a licensee, then we're talking about -- who are we talking about here? Are we talking about just Live365? Or are we talking about all those on the Live365 service that have been identified throughout this proceeding as webcasters?

MR. OXENFORD: We are talking about Live365, who is the service that makes the eligible digital audio transmissions. It's the one that's actually making the transmissions.

JUDGE ROBERTS: So Live365, then, in the way that you have set this regulatory language up, is -- must be then, I guess, both the commercial webcaster and the aggregation -- aggregated webcasting service.

MR. OXENFORD: Correct.

JUDGE ROBERTS: Well, I pity the person in the public that looks at this and tries to figure out that, indeed, that is the setup here, again,

particularly when your proposed findings and your witnesses have been talking about all the webcasters that are present on the Live365 service. Because they're not webcasters, at least not according to this.

MR. OXENFORD: They are aggregated webcasters --

JUDGE ROBERTS: No, they are not.

MR. OXENFORD: -- under the definition.

JUDGE ROBERTS: Not according to this definition, they are not. Because the word "webcaster," "commercial webcaster" in your definition says that's the licensee. And those people are not the licensee. Live365 is the licensee.

MR. OXENFORD: Because those people are not the ones that are making the digital audio transmission.

JUDGE ROBERTS: Fair enough. But I don't understand why, through this proceeding, we've been talking about webcasters on the Live365 service when they are not the licensee. Why weren't you talking about channels? That we just have 6,000 channels?

MR. OXENFORD: Perhaps we should have used the words "channels" or "programmers" or something else as opposed to "webcasters." And I apologize for the confusion.

JUDGE ROBERTS: Even your proposed findings are talking about the webcasters present on the Live365 platform, or service as you identify it. But that's not accurate. Because they're not the licensee.

MR. OXENFORD: That's correct.

CHIEF JUDGE SLEDGE: The transcript will show that this morning you said that Live365 pays the license for the webcasters.

MR. OXENFORD: For the aggregated webcasters. That's correct.

CHIEF JUDGE SLEDGE: Now you're saying that that's not true. That they don't pay any royalties? That they don't owe any royalties? That they're not a licensee?

MR. OXENFORD: Live365 is the licensee who pays for the aggregated webcasters.

CHIEF JUDGE SLEDGE: And you said -- which

is different than what you told us this morning?

MR. OXENFORD: I don't believe it's different. If I did --

CHIEF JUDGE SLEDGE: Let me say it again. This morning you said that Live365 pays the royalties for the licensee.

MR. OXENFORD: If I said that, Your Honor, I misspoke. Because Live365 is --

CHIEF JUDGE SLEDGE: That's what you've been saying this whole proceeding.

MR. OXENFORD: Live365 is the licensee. And it's paying for those who utilize the webcast aggregation service.

CHIEF JUDGE SLEDGE: Even the evidence -- the documents that you put into evidence in this proceeding that are your offerings from your Web site include a provision that you can sign up under one program, and Live365 will pay your license.

MR. OXENFORD: Correct.

CHIEF JUDGE SLEDGE: And now you're saying that's not the case at all. That Live365 is the licensee.

MR. OXENFORD: Live365 is the licensee. Live365 is the license -- is recognized by SoundExchange, has been recognized by SoundExchange as the licensee.

What we say to -- in our commercial statements on our Web site that's been offered into evidence, I believe actually by SoundExchange, that's -- that's not what we're saying legally. When we're saying that we're paying their license fees, we're paying the license fees that a webcaster who chooses to use our service, who becomes an aggregated webcaster under the terms that we've suggested here, we are the licensee who is paying the service. Live365 is the licensee who is paying the service.

JUDGE ROBERTS: Again, I have to point to the fact that your witnesses consistently went on talking about the webcasters that were on your service and that we pay for those webcasters for their licenses. And they can elect not to have us pay for them if they want to step out of it. But we're paying the licenses.

And there's only one license that's being

talked about here.

MR. OXENFORD: We are paying the licenses for the services that choose to be part of our aggregation service. We are the licensee for those services.

People can use the other part of the Live365 platform that we've heard so much about to transmit -- to do the technical transmission, just like they can go out and hire a third-party company to do the transmission and pay their own royalties and be their own licensee.

What we are talking about here are the services that choose to become part of the Live365 aggregation service, where we are the ones that are the licensee --

JUDGE WISNIEWSKI: Well, now you just used the word services twice there again. That goes back to what -- conflicts with what you told me, that they are not services.

MR. OXENFORD: Okay. I apologize. We are the ones that are providing. We are the service that is the licensee that is streaming for these other

webcasters who are essentially providing us the programming that is then streamed to the public.

And we are the licensee in that case.

JUDGE ROBERTS: And you believe that somebody looking at this regulatory language would be able to figure out, if they were an aggregator, that, oh, yes, I'm the service, I am the commercial webcaster, and I'm also the aggregation webcasting service? I'm both?

MR. OXENFORD: I'd have to say that there are a lot of ambiguities in this statute. And the rules that the general public might not --

JUDGE ROBERTS: We can't do anything about the statute. But we can certainly do something about the regulations --

MR. OXENFORD: Right.

JUDGE ROBERTS: -- since they're our regulations.

Again, I ask you, would that be evident to somebody who went and looked at the regulatory language that you're proposing here as an attachment to your proposed findings, that, yes, I understand

that if I'm an aggregation service, I am both these entities?

MR. OXENFORD: Well, Your Honor, if it's not clear, I believe you've got the ability to substitute language that makes it clear. I've told you --

JUDGE ROBERTS: Apparently that's what's going to have to be done.

MR. OXENFORD: Right. And it may be just by including in the language of the definition of a webcast aggregation service the word "licensee." It is a licensee who does this.

JUDGE ROBERTS: All right.

CHIEF JUDGE SLEDGE: Anything else?

MR. OXENFORD: Thank you.

CHIEF JUDGE SLEDGE: Thank you.

Anything further? All right. That completes our closing arguments. The closing arguments are the last phase of the -- of the proceeding. The only remaining part is for the determination. And that is what we will begin to undertake based on the record you have provided us, the arguments made, and the submissions made.

We stand adjourned.

(Whereupon, at 2:21 p.m., the hearing was concluded.)

* * * * *

C E R T I F I C A T E

I, Vicky Reiner, RMR, CRR, and Notary Public for the District of Columbia, duly commissioned and qualified, do hereby certify that the proceedings in the cause aforesaid was taken down by me in stenotype and subsequently transcribed into English text, and that the foregoing is a true and accurate transcript of the proceedings so held.

I do hereby certify that the proceedings were taken at the time and place as specified in the foregoing caption.

I do hereby further certify that I am in no way interested in the outcome of this action.

In witness whereof, I have hereunto signed my name this 13th day of October, 2010.

Vicky Reiner

Vicky Reiner
Notary Public in and for the
District of Columbia

My Commission expires:
September 30, 2012

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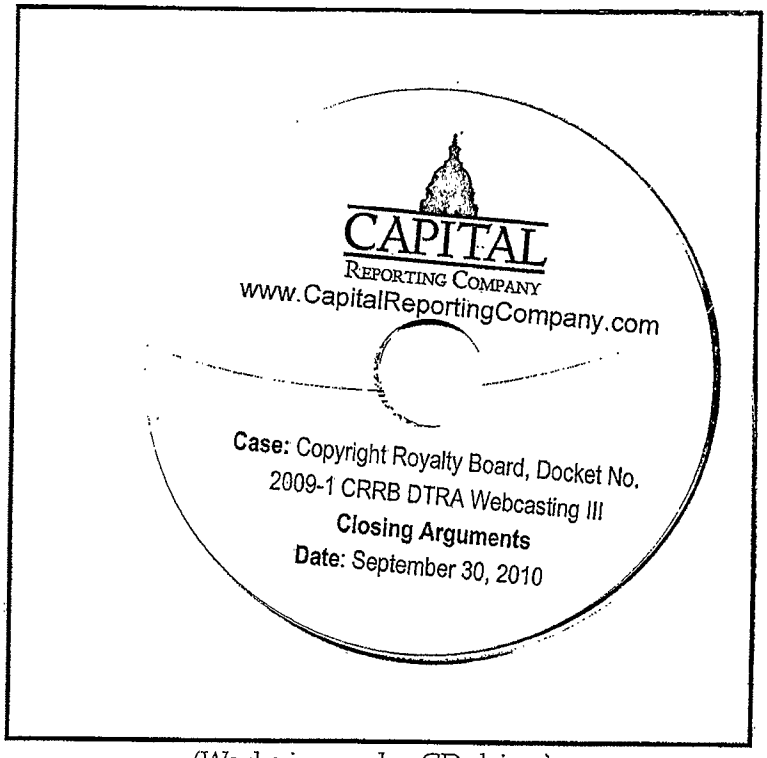

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